United States Court of Appeals

for the Second Circuit

APPENDIX

74-1365

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1365

UNITED STATES OF AMERICA,
Appellant,

—against—

PABLO BERRIOS, WILLIAM NUCHOW,
MATTHEW PRINCIPE, JULIUS ZARETSKY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

DENIS E. DILLON,
JAMES W. DOUGHERTY,
Special Attorneys,
U.S. Department of Justice.



PAGINATION AS IN ORIGINAL COPY

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100

CRIMINAL DOCKET

73CR 308

JUDD,

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	
✓ PABLO BERRIOS ✓ WILLIAM NUCHOW ✓ MATTHEW PRINCIPE ✓ JULIUS ZARETSKY	Deft BERRIOS: J. [illegible] 540 Madison For Defendant (686-8070) FOR ZARETSHY & NUCHOW: Michael Standard 30 East 42nd St., (OX7-8640)

Had been previously convicted of crime of Arson and did hold position as member of exec.board of Teamsters Organization

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBU
Fine,		3-8-74	Govt's Notice of Appeal		
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
3-26-73	Before COSTANTINO J - Superseding Indictment filed.
4/12/73	Before JUDD, J.- Case called- Defts and counsel present-All defts arraigned and enter pleas of not guilty-Court will appoint L.A.S. deft PRINCIPE-All defts released on O.R.-60 days for motions-Case adjd to 6/25/73 for trial.
4/12/73	~~XXXXXXX~~ Notices of Appearances filed. (for defts BERRIOS, [illegible] AND WILLIAM NUCHOW)
4-13-73	Magistrate's file 73 M 535 inserted into CR file.
5/7/73	Notice of Motion filed, ret. 5/18/73 re: for an order dismissing indictment, etc.
5/15/73	Govt's Motion to Dismiss Pre-trial Motions of Defts, filed
5/18/73	Before JUDD, J.- Case called- Adjd to 5/25/73

DATE	PROCEEDINGS
5/22/73	Notice of Readiness for Trial filed.
5/25/73	Before JUDD, J.- Case called- Adjd to 6/8/73.
6-5-73	Notice of Motion filed for disclosure of Grand Jury Proceedings with Memorandum in support of motion; Motion disclosure of electronic surveillance, to suppress evidence and for dismissal of the indictment, with Memorandum in support of motion filed (ret. June 8, 1973)(NUCHOW)
6/8/73	Before JUDD, J.- Case called- Defts and counsel present-Adjd to 10/15/73 trial.
6/11/73	Deft BERRIOS.'s Memorandum of Law filed.
7-20-73	By JUDD, J - Order filed that the time for the Govt to submit respons to motions attacking the constitutionality of 29, U.S.C.504, and motio for disclosure of electronic or other surveillance, be and the same hereby is extended to and including Aug. 6, 1973.
8/2/73	Meomrandum in opposition to the Deft's motion to inspect Grand Jury Mins filed
8-6-73	Govts. Memorandum in response to deft Nichow's motion for disclosure o electronic surveillance filed.
8/7/73	Affadavit and letter of Martin Garbus filed
8-9-73	Affidavit of RICHARD L. SHANLEY filed.
9-14-73	Affidavit of Michael B. Standard filed.
9-21-73	Before JUDD, J - case called & adjd to Oct. 5, 1973.
10/3/73	Supplemental Affidavit of Michael Standard, Esq. filed- (NUCHOW)
10/5/73	Before JUDD,J.- Case called- Adjd to 10/12/73
10-11-73	Supplemental Memorandum filed of deft NICHOW.
10/12/73	Before JUDD,J.- Case called- Attys for both sides present-Deft's mot to dismiss on grounds of selective prosecution -Motion granted and d in part-Govt to submit order.
10-15-73	Stenographers transcript filed dated Oct. 12, 1973.
0-19-73	By JUDD, J - Order filed that the Govt affirm or deny whether any bra of government including the F.B.I., the Dept. of Labor, the Internal Re Service, U.S.Postal Service, etc. or any other agency of the Federal G known to the Dept. of Justice to engage in electronic surveillance has placed any electronic surveillance device on counsel, Victor Rabinowit Leonard Boudin, Michael Standard and eech of them for the period Oct. 1 through the date of this order at the names and addresses appended hereto as Exhibit A or at any other location where deft and counsel had an ex tion of privacy and that copies of the log of any such electronic surve ance be delivered in court for in camera inspection.

73 CR--308
CRIMINAL DOCKET

IV

DATE	PROCEEDINGS
11-19-73	Letter dated Nov. 16, 1973 received from Chambers filed from U.S. Dept of Justice, Denis E.Dillon, Esq. (Berrios)
11-19-73	Before JUDD,J.- Case called- Defts not present- Counsel present Mr. Garbus- Case adjd to 11-26-73 for hearing
11-26-73	By JUDD,J.- Order filed that the U.S. provide counsel for the and the court with a copy of the memorandum of the U.S. Attorney the Organized Crime and Racketeering Section, Dept of Justice rec ding prosecution of the deft and further ordered that there be from that memorandum any reference to testimony before the Grand of non-defts(BERRIOS)
11-26-73	Before JUDD,J.- Case called- Defts not present- Counsel present Deft's motion to dismiss- Decision reserved- Defense counsel to submit memo within 1 week- Govt to respond to defts' motion by
12-4-73	Notice of Motion filed, ret. Dec. 7, 1973, (defts Nuchow and Zaretsky) for dismissal of the Indictment etc.
12-6-73	Notice of motion to dismiss the indictment filed ret. 12-7-73
12/7/73	Before JUDD,J.- Case called- No appearances-Motion to dismiss the indictment-makked submitted-Decision reserved.
1-7-74	BY JUDD, J.- Memorandum and Order filed that the Indictment be dismissed , unless the U.S. within 30 days after the date of this Memorandum and Order (1) makes available to the defts Nuchow and Zaretsky the tapes and available transcripts of all conversation any member of the firm representing them which have been overheard and (2) submits to the court the memorandum recommending prosecution, for the court's study and for release to the defts of any portions thereof which the court shall determine are not required to be kept confidential.
1-24-74	Affidavit of JAMES W. DOUGHERTY filed.
2-4-74	Reply Affidavit of James Dougherty filed
2-8-74	By JUDD, J - Order filed that the Indictment be dismissed as against all defts.
3-8-74	Notice of appeal from order of 2-8-74 dismissing the indictment Govt's
3-8-74	Docket entries and duplicate of notice of appeal sent to C of

:13:dtj
:9661

A. 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

-vs-

PABLO BERRIOS

----------x

73 CR 22

INDICTMENT

29 U.S.C. §504

1-8-73

JUDGE

THE GRAND JURY CHARGES:

COUNT ONE

From on or about the 17th day of June, 1971, to on or about the 29th day of June, 1972, in the Eastern District of New York, the defendant PABLO BERRIOS, having theretofore been convicted of the crime of arson in the Supreme Court, County of Bronx, State of New York on the 16th day of June, 1971, willfully did serve as an officer, that is a Trustee and member of the Executive Board of Local No. 840, International Brotherhood of Teamsters, a labor organization engaged in industry affecting commerce within the meaning of sections 402(i) and 402(j), Title 29, United States Code.

(29 U.S.C. Section 504)

A TRUE BILL

FOREMAN

Robert A. Morse
United States Attorney

A 2

DED:RLS:dtj
F. 725661

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

-vs-

PABLO BERRIOS
WILLIAM NUCHOW
MATTHEW PRINCIPE
JULIUS ZARETSKY,

Defendants

----------x

73 C 12'308

SUPERSEDING INDICTMENT

29 U.S.C. §504

Filed 3/26/73

THE GRAND JURY CHARGES:

COUNT ONE

That on or about and between the 2nd day of September, 1971, and the 31st day of July, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant PABLO BERRIOS, having theretofore been convicted of the crime of arson in the Supreme Court, County of Bronx, State of New York on the 2nd day of September, 1971, wilfully did serve as a Trustee and member of the Executive Board of Local No. 840, International Brotherhood of Teamsters, a labor organization engaged in an industry affecting commerce within the meaning of sections 402(i) and 402(j), Title 29, United States Code.

(Title 29, United States Code, Section 504)

COUNT TWO

That on or about and between the 2nd day of September, 1971 and the 31st day of July, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant WILLIAM NUCHOW, the defendant MATTHEW PRINCIPE, and the defendant JULIUS ZARETSKY, officers of Local 840, International Brotherhood of Teamsters, a labor organization engaged in an industry affecting commerce within the meaning of sections 402(i) and 402(j), Title 29, United States Code, within five years after the conviction of the defendant PABLO BERRIOS for arson, wilfully and knowingly permitted the defendant PABLO BERRIOS to assume and hold the position of a Trustee and member of the Executive Board of the aforesaid Local 840.

(Title 29, United States Code, Section 504)

A TRUE BILL

_____
FOREMAN

_____
Robert A. Morse
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 4

Filed 5/22/73

----------X

UNITED STATES OF AMERICA

-against-

PABLO BERRIOS, ET AL

NOTICE OF READINESS FOR TRIAL

Court Docket No.

73 CR 308

Defendant(s)

----------X

S I R (S):

PLEASE TAKE NOTICE that the United States is ready for trial.

Since the defendant(s) is/are not in custody a trial date will be requested as soon as the case can be reached by the Court, subject to receiving three days' advance notice of the actual date for trial.

Dated: Brooklyn, NY
May 18, 1973

Yours, etc.,

ROBERT A. MORSE
United States Attorney
Eastern District of New York

By Richard L. Shanley
SPECIAL ATTORNEY

TO:

Honorable Orrin J. Judd
United States District Judge

Attorney(s) for Defendant(s):

Martin Garbus, Esq.
540 Madison Avenue
New York, NY 10022

Michael Standard, Esq.
30 East 42nd Street
New York, NY

Edward Kelly
Legal Aid
225 Cadman Plaza, East
Brooklyn, NY 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 5

---------- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPE, and JULIUS ZARETSKY,

Defendants.

---------- X

73 CR. 308

NOTICE OF MOTION

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARTIN GARBUS, Esq. and all the proceedings heretofore had herein, a motion will be made in this Court, Criminal Motion Part, on the day of , 1973, for Orders pursuant to the Federal Rules, granting the following relief:

I. Dismissing the indictment on the grounds that 29 U.S.C. 504, as written, interpreted and applied, violates the First and Fifth Amendments to the United States Constitution;

II. Discovery and Inspection;

III. Delivery to the defendant of all evidence favorable to him under the authority of Brady vs. Maryland, 373 U.S. 83;

IV. A Bill of Particulars;

V. A hearing or an inquiry by the Court to determine the existence of and admissibility of any statements, admissions or confessions taken from the defendant and suppression of said statements, admissions or confessions in the event they were acquired illegally;

VI. A hearing or an inquiry by the Court to determine the existence of and admissibility of any physical evidence or eavesdropping evidence seized from the defendant , and suppression of such evidence in the event it was acquired illegally;

VII. Such other and further relief as is just and proper under all of the circumstances of this case.

Dated: New York, New York
May 2 , 1973

Yours, etc.,

EMIL, KOBRIN, KLEIN & GARBUS

BY: /s/ Martin Garbus
A Member of The Firm

Attorneys for Defendant, BERRIOS
Office and P. O. Address
540 Madison Avenue
New York, N.Y. 10022
(212) 688-6040

TO: HON. ROBERT A. MORSE
United States Attorney
Eastern District of New York
Office and P. O. Address
225 Cadman Plaza East
Brooklyn, New York 11201

RABINOWITZ, BOUDIN & STANDARD, Esqs.
Attorneys for Defendants, NUCHOW,
PRINCIPE and ZARETSKY
Office and P. O. Address
30 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPE, and JULIUS ZARETSKY,

Defendants.
----------X

73 CR. 308

AFFIDAVIT

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARTIN GARBUS, Esq., being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York, and I am a member of the firm of Emil, Kobrin, Klein & Garbus, with offices at 540 Madison Avenue, New York, New York. I represent the defendant, PABLO BERRIOS and I am thoroughly familiar with all the facts and circumstances surrounding this case.

2. On or about March, 1973, an indictment was filed against the defendant, charging him and others with a violation of 29 U.S.C. 504.

3. This application is made in support of a number of different forms of relief. We will, in our Memorandum of Law, set forth the constitutional arguments that compel a dis-

missal of the indictment. The affidavit is divided accordingly under a number of different subheadings, such as "Bill of Particulars", "Discovery and Inspection", "Brady Material", etc. The subheadings are labeled A, B, C, etc., and under each of the subheadings, the specific request for relief or allegations in support of said application are number 1, 2, 3, 4, etc. There follows an index of the various forms of relief requested, together with the page number upon which they appear.

I N D E X

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A. Discovery and Inspection

1. Pursuant to the Federal Rules of Discovery, the defendant demands discovery and inspection of any written or recorded statements, admissions or confessions made or alleged to have been made by him, or any summaries, synopsis, notes, memoranda or resumes thereof, regardless of whether such statements were reduced to writing or will be testified to by a witness for the Government.

2. The defendant further respectfully requests that discovery be ordered with respect to any and all reports and documents relating to any scientific tests or experiments made in connection with this particular case, including but not limited to, any voice recordings, handwriting samples, photographs, fingerprints or other such materials which are now or which may in the future be in the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence should become known, to the U.S. Attorney.

3. The defendant further respectfully requests that discovery be ordered as to the following items which are now or which may in the future be in the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence should become known, to the U.S. Attorney on the grounds that these items are material to the preparation of the defense and the request for them is reasonable:

(1) Any written or recorded statements, admissions or confessions made by the defendant or any summaries, synopses, notes,memoranda, or resumes thereof, regardless of whether such statements were reduced to writing or will be testified to by a witness for theGovernment.

(2) All reports, memoranda or other internal documents relating to the statements made by the defendant.

(3) The names and addresses of any experts who conducted any scientific tests or experiments including but not limited to any experts who will testify with respect to voice recordings, handwriting samples, photographs, or other such materials, and copies of those experts' reports.

(4) The names and addresses of all expert witnesses employed by the Government in connection with any of the charges against the defendant, regardless of whether such witnesses will be called by the Government to testify.

(5) The names and addresses of all other witnesses interviewed by the Government or any agent of the Government in connection with any of the charges against the defendant, regardless of whether such witnesses will be called by the Government to testify.

(6) A copy or resume of the conviction records of any and all witnesses the Government intends to call to testify.

(7) A copy of any search warrants issued in this case or in connection with this case.

(8) All items taken from any of the defendant's homes or places of business by federal or state agents acting either with or without a search warrant.

(9) Copies of any and all photographs, papers, documents, tangible objects or other material showing scenes, places of meetings, or any other area where it is claimed that the defendant committed the crimes charged, or any other photographs, diagrams or other graphic representations which in any way relate to the charges against the defendant.

(10) With respect to those items of which the Court in its discretion may not permit discovery by the defense, it is requested that the Court, in the interests of justice and the administration of the courts, require the Government to disclose the existence of such items and whether or not those items have been used in the investigation and preparation of this case, and further, whether or not the Government intends to use such items at the trial.

4. In cases of this nature it is to be reasonably anticipated that all of the foregoing items may be used by the Government in the prosecution of these charges. Virtually every aspect of this case against the defendant depends on such evidence.

5. In every instance, the Government has exclusive possession of all the items requested above and has had an extended period of time in which to examine and investigate them. It is unreasonable and unrealistic to expect the defense to wait until trial to examine or use these items in its case or in testing the Government's case

6. In the event any electronic surveillance was conducted of the defendant in any manner whatsoever, discovery is requested of the following items:

(1) All telephone company toll tickets reflecting any telephone calls which the prosecution will allege were made in the commission of the crime.

(2) All mechanical or electronic recordings and tapes that contain thereon any of the defendant's conversations which were made through the use of an electronic eavesdropping device.

(3) All mechanical or electronic recordings and tapes of any statements or conversations which occurred at any place or through any facility owned or leased by the defendant or in which he had a proprietary interest.

(4) All memoranda, logs, reports, records, notes, summaries, transcriptions, TWX communications, airtels, and written communications of any nature whatsoever which were made by any employee or agent of the prosecution with respect to the statements or conversations which were electronically surveilled.

(5) A sample of each type of electronic eavesdropping device which was utilized to obtain the matters which were electronically surveilled.

(6) All documents, directives, orders, circulars or memoranda pertaining to the use of electronic eavesdropping devices and the information received therefrom which were made or issued by any agent of the prosecution with respect to the statements or conversations which were electronically surveilled.

(7) All documents, directives, orders or memoranda which purport to authorize the installation of any electronic device used in electronic surveillance.

(8) All applications and orders secured.

(9) All applications and orders secured under the authority of Chapter 119 of the United States Code.

(10) The contents of all such statements and conversations thus overheard, and all memoranda prepared in connection therewith.

(11) All information obtained through electronic surveillance conducted by any other governmental agency, whether state or federal, of any of the defendant or any other persons who may have communicated with the defendant, wherein conver-

sations to which the defendant was a party were overheard or conversations which were conducted on or in any of the defendant's premises, whether private or business, where other persons were overheard or in any instance where any of the defendant or co-defendants were overheard.

7. It is respectfully requested that any order of the Court directing discovery contain an admonition that the U.S. Attorney has a continuing duty to disclose or suffer the sanctions permitted by the statute and, under the inherent powers of this Court, a further order that any such disclosures made by the prosecution be made solely to the Court and to defense counsel, and that contents of any materials so disclosed not be made public or available to any other persons, and that such disclosure so ordered by this Court be made outside the presence of any representative of the prosecution. This request is made so that there is no violation of the attorney's work product rule through observation by the prosecution of the manner in which the defense is prepared in the case.

8. Counsel specifically reserves the right to make any additional requests for discovery material at the time this motion is argued or at such other time as the existence of such material shall become known to counsel or the defendant.

B. Brady Material

1. The defendant moves this Court to grant an Order compelling the Prosecution to disclose to the defendant, and, in the case of any books, papers, reports, testimony, statements, photographs or other tangible items, to produce and deliver for inspection and copying by the defendant, all evidence in the possession, custody or control of the Prosecution the existence of which is known, or by the exercise of due diligence may become known, to the Prosecution. This motion is made under the authority of Brady v. Maryland, 373 U.S. 83.

2. This evidence, which is referred to as "Brady Material", is evidence which may be favorable to the defendant, and material to the issue of guilt or punishment, or bears upon and could reasonably weaken or affect any evidence proposed to be introduced against the defendant by the Prosecution or bears in any material degree on the charge contained in the indictment, or is relevant to the subject matter of the indictment and prosecution under it, or, in any manner, may aid the defendant in the ascertainment of the truth.

3. Very often, in cases such as the one at Bar, there are a number of witnesses who furnished statements to the Prosecution which are favorable to the defendant, but who may not be called at the time of the trial in this matter. The

statements of those witnesses should be turned over to the defense of this juncture so that they might be interviewed by defense counsel in order to determine, in advance of trial, whether these witnesses should be called on behalf of the defense.

4. If the defense is forced to wait until the time of trial, which may be an exceedingly short one, it may be too late for it to contact the witnesses, interview them, and arrange for their being subpoenaed on behalf of the defense. Therefore, it is imperative that the evidence in the Prosecution's file which is favorable to the defense be disclosed immediately so that arrangements can be made for these witnesses to be called during the course of this trial.

5. The disclosure and production requested here should be made without regard to whether or not the evidence to be disclosed and produced is deemed to be admissible at the trial of this action, and the disclosure and production should include, but not be limited to, the following evidence:

(1) Any written or recorded statements, admissions or confessions made by any witness or co-defendant which may be exculpatory, nonincriminatory, or otherwise favorable to this defendant, or any summaries, synopses, notes, memoranda or resumes thereof, regardless of whether such statements were reduced to writing and regardless of whether the Prosecution intend to use such statements at trial.

(2) The name and address of such witnesses and the names and addresses of any other witnesses who might be favorable to the defendant.

(3) Any and all written statements made by any witness who had been interviewed by an agent for the Prosecution in connection with the subject matter in this case and whom the Prosecution presently do not intend to call at trial, regardless of whether said statement has been signed or otherwise adopted or approved by said witness; or any stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent for the Prosecution and recorded contemporaneously with the making of such oral statement.

(4) The names and addresses of all persons who may have some knowledge of the facts of the present case.

(5) The criminal records or any list or summary reflecting the criminal records of all persons the Government intends to call at trial.

(6) Any notes, memoranda, summaries, reports or statements of any kind prepared by agents of the Government in connection with the investigation of this case.

(7) Any notes, memoranda, summaries, reports or statements of any kind prepared by persons other than agents for the prosecution in connection with the investigation of this case.

6. The rule announced by the United States Supreme Court in Brady vs. Maryland, supra, and which the defense asks this Court to enforce, should impose no hardship on the prosecution in that we are only asking for that evidence which is favorable to the defense, and thus, if it involves witnesses, it is expected that they would be friendly toward us. Thus, the

exaggerated claims usually made by the prosecution that witnesses will be threatened is inappropriate here.

7. When a person is ultimately charged with a crime, the finding of the law enforcement agency involved should be as readily available to the defendant as the prosecution. The prosecution's responsibility to the defendant is no less than the duty owed to any other member of our society.

for the investigation of a crime by the police should be designed not only to convict the guilty, but to free the innocent. For all these reasons, any evidence in the file of the Prosecution which is favorable to the defendant, whether it be documentary, statements of witnesses, or in any other form, should be delivered to the defendant at this moment so that the defense can effectively use this evidence in preparing its case.

8. In order to equitably implement this rule, it is requested that the Prosecution's file be produced in Court and examined by the Court and defense counsel so that a fair determination can be made of that material which is favorable to the defense. The decision of what material exists in the Prosecution's file favorable to the defense cannot be left to the Prosecution, but must be supervised by the Court.

9. Counsel specifically reserves the right to make any additional requests for material covered by Brady vs.

Maryland, supra., at the time this motion is argued, or at such other time as the existence of such material shall become known to counsel or the defendant.

10. It is respectfully requested that the Court specifically admonish the Prosecution that they have a duty to disclose any evidence favorable to the defendant and that such duty is a continuing duty.

C. Bill of Particulars

1. Pursuant to the Federal Rules, the defendant moves for an Order compelling the Government to file with the Court and serve upon the defendant a Bill of Particulars relating to the charges against the defendant and particularly setting forth the following:

(1) State what, if any, specific act the defendant performed in committing the acts described in the complaint.

(2) State with specific clarity the exact locations and manner in which it is alleged that the defendant was present with said destructive devices.

(3) State whether the Government has custody, control, possession or knowledge of any recording or of any notes, logs or transcripts of any wiretap or eavesdrop of a conversation to which any of the co-conspirators was a party, or which occurred in any premises or any facility owned or leased by them, or in which they had a proprietary interest.

(4) State whether the Government intends to offer into evidence any statement implicating the defendant in the commission of the crimes charged, made

by a co-conspirator, or by any other person whom the Government may call as a witness upon the trial and state the name of the person or persons who made the statement and the contents of the statement allegedly made.

(5) State the precise manner in which the defendant is alleged to have obtained the knowledge with which it is alleged he committed each of the criminal acts charged.

(6) State the precise nature of the knowledge with which it is alleged the defendant committed each of the criminal acts charged.

(7) State whether any other persons named as participants in any of the transactions or acts described in the complaint solicited, importuned or requested the defendant to commit any of the acts with which he is charged.

(8) State whether any of such persons acted in any way on behalf of, or after intervention by, any representative of the Government during any part of the transactions or acts charged on this indictment.

(9) State the names and addresses of those who so acted.

(10) State whether the Government have in their possession or control any reports of any statements made by the defendant during the period covered by the complaint or up untilthe filing thereof to any person who, at the time the statement was made, was an agent of the Government.

2. It is imperative that the defendant have this information in order to properly prepare his defense in this case. The information sought is within the particular knowledge of the United States Attorney and cannot be obtained by means other than this process.

D. Statements of the Defendant

1. The defendant hereby demands that the United States Attorney serve upon his attorney forthwith such a notice, together with a copy of the statement, and/or a verbatim account of any oral statements alleged to have been made by the defendant. In the alternative, the defendant respectfully requests that the Court preclude the Government from offering such evidence at trial.

2. In the event the Government serves such a notice, the defendant hereby announces his intention to move to suppress such evidence and respectfully requests the Court to allow him a reasonable length of time after his receipt of the notice and the copies of his statements or the verbatim account of any oral statement, within which to make said motion.

E. Government Informer or Undercover Agent

1. The defendant requests the prosecution to disclose whether any government informers or undercover agents supplied evidence to the prosecution either before, during the course of, or after the investigation and prosecution of this complaint against the defendant. This request is made so that the defendant may promptly move to suppress that evidence on the grounds that it was illegally obtained. Therefore, the defendant demands to know now whether there were any informers working for the prosecution, either as agents or as employees who were obtaining information concerning this alleged offense and supplying it to the prosecution. It may be that these informers will not be used as witnesses in this case, but the defendant is entitled to know about the source of this information because it may have led to other evidence which will be offered in the trial or may have been contaminated by the illegal original source which the defendant has a right to challenge. It is urged that this evidence may have been acquired in a way that violates the defendant's rights under the Fourth and Fifth Amendments to the United States Constitution.

2. So that there can be no mistake about the defendant's request herein, it is urged that under the decisional law of the United States Supreme Court, this defendant is entitled to have the prosecution disclose whether any agent, employee, special employee, or informer, paid or unpaid, was at the direction of any law enforcement agent, used or instructed

to gather evidence or information and/or to participate in any way in the activities which form the basis of these charges. If such information was acquired through federal agencies, the defendant is entitled to know about it.

F. Other Motions

1. At the time this motion is argued, the defendant respectfully reserves the right to request further details in the form of either Bills of Particulars or in the nature of discovery, as the need for that information becomes apparent.

2. The defendant also reserves the right to make any and all other motions which may be necessitated by reason of the granting of certain relief requested herein. And further, if facts should develop which would require the making of other motions, counsel respectfully reserves the right to make those motions. For example, if it should be discovered that the empaneling of the grand jury in this case or the petit jury in this case systematically excluded certain groups of citizens representing a fair cross-section of the community, then counsel reserves the right to move against the grand jury venir or the petit jury venir.

WHEREFORE, it is respectfully requested that this Court grant the relief requested in the various branches of this motion and accord this defendant such other and additional relief as is just under all the circumstances of this case.

MARTIN GARBUS

Sworn to before me this

2 day of May , 1973.

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPE, JULIUS ZARETSKY,

Defendants.
---------- X

73 CR. 308

AFFIDAVIT

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARTIN GARBUS, being duly sworn, deposes and says:

1. I represent PABLO BERRIOS. I submit this affidavit in support of the m oti›n for a hearing cn defendants' application for an order dismissing the indictment on the grounds that defendants are victims of a selective prosecution.

2. Defendant PABLO BERRIOS is being unfairly prosecuted because hs is involved with one of the few Teamster locals to support McGovern and because of the fact that they are involved in a bitter labor dispute with an important Nixon supporter.

3. The facts we believe are as follows: that this particular Teamster local was involved in a long and bitter labor dispute with Marriott interests including their restaurants and hotels; that Mr. Marriott is a principal in the Marriott

Restaurants and Hotels; and that Mr. Marriott is a significant financial contributor to Nixon and a close friend; that one of Marriott's officers is Mr. Nixon, the cousin of the President. Charles Colson, former White House counsel, now Teamster counsel, is, we believe, a prime mover in this prosecution.

4. We know that Frank Fitzsimmons, the Teamster head, had contributed a substantial sum of money to the Democrats for Nixon fund; that the extent of the Teamsters contribution to the Committee to Re-Elect the President is estimated at in excess of $400,000; that Charles Colson, formerly counsel to the President, played a role in insuring James Hoffa's parole and in removing electronic surveillance placed on Teamster phones in order to uncover criminal activities; that Charles Colson, recent events show, has been involved in processes similar to the case at bar and that the Justice Department has, over the past months, been with good reason accused of subverting the legal process for political means.

5. We also know now that one of the peqie on the "enemies" list prepared by Charles Colson for John Dean and Prsident Nixon was Harold Gibbons, a Teamster official, who supported McGovern. BERRIOS, one of the defendants in this case, was probably one of the most visible Teamster-McGovern supporters. He has a bng history of political involvement.

6. As the annexed document indicates, there are rarely prosecutions under 29 USC 504. We believe there are hundreds of unions who have men with prison records sitting as officers. The

why this prosecution was brought was because of the facts contained in this affidavit, not because of a technical violation of the law.

7. We believe these facts are sufficient to justify an investigation into the background of this prosecution. We would at the appropriate time furnish the Court with a list of names of the people that we would intend to call. Suffice it to say that we would expect initially to call Charles Colson, John Dean and Mr. Marriott. We believe the facts that we can prove make this a much stronger case than Falk vs. United States (7th Cir. April, 1973).

MARTIN GARBUS

Sworn to before me this
7th day of August, 1973.

Ann E. Mendelson

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed 8/9/73

----------x

UNITED STATES OF AMERICA

-vs-

PABLO BERRIOS, ET AL

----------x

AFFIDAVIT

73 CR 308
73 CR 22

RICHARD L. SHANLEY, being duly sworn, deposes and says that he is a Special Attorney, United States Department of Justice, duly appointed according to law and acting as such. He is fully familiar with all the facts and proceedings in this case.

1. This affidavit is submitted in opposition to the affidavit of Martin Garbus, Esq., dated August 7, 1973, in support of the defendant Berrios' motion to dismiss this indictment in which he alleges that Berrios and his co-defendants are victims of selective prosecution.

2. The sundry allegations in the aforementioned affidavit include those that:

1) Berrios was singled out for prosecution because of his teamster affiliation and his "visible teamster - Mc Govern" support; and

2) Charles Colson, former White House Counsel, is "a prime mover in this prosecution." These allegations and all allegations of Government misconduct in this case are categorically denied.

3. Mr. Garbus also alleges in paragraph 6 of his affidavit (in which he refers to an "annexed document" which document was not annexed to the Government's copy of his affidavit) that "we believe there are hundreds of unions who have men with prison records sitting as officers." As Mr. Garbus well knows, Title 29, United States Code, Section 504, the statute under which Berrios and his

co-defendants are being prosecuted limits the restriction to holding union office to a period of 5 years after conviction or the end of imprisonment. This restriction also is only applicable to those felons who were convicted of crimes of violence or moral turpitude such as arson, extortion, robbery and rape.

Mr. Carbus' allegations are therefore vague and unspecific. Should he know of any instances in which convicted felons are serving in violation of Title 29, United States Code, Section 504, he should come forward with such information, so that the necessary action can be taken.

WHEREFORE, it is respectfully requested that the defendant's motion be denied.

Respectfully Submitted,

Richard L. Shanley
Special Attorney
Organized Crime & Racketeering Section

Dated: Brooklyn, NY
August 9, 1973

Sworn to before me this 9th day of August, 1973

NOTARY PUBLIC
STATE OF N.Y. -1027125
QUALIFIED WESTCHESTER
TERM EXPIRES 3-30-75

EMIL, KOBRIN, KLEIN & GARBUS
540 MADISON AVENUE NEW YORK, N.Y. 10022

COPY

Dougherty

August 28, 1973

Orrin G. Judd, Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States of America vs. Pablo Berrios, et al.
73 Cr. 308

Honorable Sir:

I apparently omitted to annex a letter to my affidavit of August 7, 1973. Annexed hereto is a letter dated May 16, 1973 from Philip Wilens of the United States Department of Justice to Mr. Herbert Jordan, an attorney involved in the defense of this case. As that letter indicates, from July, 1969 to May, 1973, a total of four years, there were three indictments. Two were dismissed and one filed November 1970 is pending trial. I would hope that at the oral argument we might have some further information with respect to indictments filed and convictions obtained under this statute.

Respectfully,

Martin Garbus

MG:aem
Enc.
cc: Richard L. Shanley, Esq.
Michael Standard, Esq.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

A 30

Address Reply to the Division Indicated and Refer to Initials and Number

May 16, 1973

PW:emc
156-51-0

Mr. Herbert Jordan
Rabinowitz, Boudin & Standard
Attorneys At Law
30 East 42nd Street
New York, N.Y. 10017

Dear Mr. Jordan:

Reference is to my previous letter of April 13, 1973, in which I undertook to obtain for you some information regarding prosecutions under 29 U.S.C. 504.

As I indicated previously, our computer records do not go back beyond 1969. The records indicate that from July 1969 to the present there have been three indictments under 29 U.S.C. 504.

In October 1969, one C. Jalas was indicted in the Northern District of Illinois. The indictment was dismissed on January 5, 1970.

In August 1970, one T. Pernicano was indicted in the Eastern District of Michigan. The indictment was dismissed on December 29, 1970.

In November 1970, one A. Gobbo was indicted in the District of New Jersey. The case is pending trial.

I trust that the foregoing is of assistance to you.

Sincerely,

Philip Wilens

PHILIP WILENS, Chief
Management and Labor Section
Criminal Division

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

73 CR 308

PABLO BERRIOS, MATTHEW PRINCIPE, :
WILLIAM NUCHOW and JULIUS ZAFETSKY,

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

October 12, 1973

B e f o r e :

HONORABLE ORRIN G. JUDD, U.S.D.J.

SHELDON SILVERMAN
ACTING OFFICIAL COURT REPORTER

APPEARANCES

ROBERT A. MORSE, ESQ.
United States Attorney for the
Eastern District of New York

BY: JAMES DOUGHERTY, ESQ.,
Assistant United States Attorney

MARTIN GARBUS, ESQ.
Attorney for Defendant Berrios

JOHN GUTMAN, ESQ.
Legal Aid Society
Attorney for Defendant Principe

MICHAEL STANDARD, ESQ.
Attorney for Defendants Nuchow and Zaretsky

****

SS/LH 1
Reel 1

THE CLERK: United States of America versus Pablo Berrios, Mathew Principe, William Nuchow, Julius Zaretsky, Criminal cause for hearing on motion.

THE COURT: I got a letter from you, Mr. Garbus, this morning saying you're going to a trial next week; is that right?

MR. GARBUS: I hope you have gotten that letter a long while ago.

MR. STANDARD: In that regard, I'm at the moment on trial in the Panama Canal Zone. I just came back two days ago.

I spoke to Mr. Dougherty approximately two days ago with regard to his view about scheduling a trial here subject, of course, to your Honor's view.

There's been a waiver of the six months rule by each of the defendants in open court. He suggested early December would be satisfactory.

THE COURT: Early December I have a nine-defendant gambling case which wouldn't give me any time in December unless it's the kind of a case that I can ask Mr. Justice Clark to try when he's here in December.

I suppose this is affected by the six month rule. Perhaps that would do it.

Have I received all the papers I'm going to receive on the motions? I thought I had requests of Mr. Garbus --

MR. GARBUS: You had a request for oral argument on the motions. It was my understanding we might have it today.

THE COURT: I'll hear you later on. That's on the unconstitutionality -- order of selective prosecution. You have motions with respect to -- electronic surveillance, which would seem to me are kind of remote.

MR. STANDARD: It doesn't appear to me. I would like to be heard on it.

THE COURT: I'll hear you after I've gone through the rest of the calendar.

MR. GUTMAN: Would you consider the motions of co-counsel to also be motions of me since I am a defendant and I have received no papers except through the good graces of Mr. Dougherty's office?

MR. STANDARD: I don't understand. I routinely send to your office. It goes to Mr. Kelly's

attention, Mr. Kelly who first entered a notice of appearance.

MR. GARBUS: I'll allow this gentlemen to look at the file.

MR. GUTMAN: I have the motion.

THE COURT: Let Mr. Gutman review the papers.

MR. GUTMAN: I ask learned co-counsel's motions also be made with mine.

THE COURT: Mark it ready.

(Recess.)

THE COURT: I have two different problems here. Mr. Garbus' motion relates to consitutionality of a statute. We have an electronic motion.

All that's involved with Mr. Garbus, he did have an arson conviction. He did serve as a union officer.

MR. GARBUS: The motion, I thought, was not the constitutionality of the statute but rather of the selective prosecution argument.

The constitutionality of the statute has been briefed out.

THE COURT: What would you bring in by way of oral evidence? I'll hear Mr. Garbus' motion first.

What would you bring in by way of oral

evidence on selective prosecution?

MR. GARBUS: First of all, we would try to prove -- we have given you a letter from the Justice Department. That indicates from 1969 to date there have been a total of three prosecutions. Of the three prosecutions --

THE COURT: Suppose the prosecution here was simply because they lost on the fire bomb case and they think something ought to be done to the fellow. That's one possibility.

The other possibility is that they don't like Mr. McGovern or the Teamsters, and therefore, they picked out this fellow.

MR. GARBUS: There are a lot of possibilities. My understanding is they were subpoenaing the documents concerning his previous record prior to the time that we have the trial on the bombing, so, I don't think -- in other words, if you had not had the bombing case, you should have had the same problem anyway.

My recollection is that your Honor may recall during the trial in January, when I was trying to get certain documents, they were going to be used in this prosecution. I had trouble getting

them. They were submitted to the same Grand Jury that had come back in the bombing case. I think the question you're asking is one that I have to respond to.

In other words, I think what has to be clear about what I can prove and what I can't prove and what the defects are. The next question is whether because of the defects that I have in argument or proof at this time, whether we should be precluded from being granted a hearing. I do not have any piece of hard evidence as we start the argument.

I want to make that clear, where I can show either Mr. Colson or Mariott made a phone call to anybody to start this prosecution.

If I had that, we'd have a different situation. I don't have that.

Let's start with what I have and what I don't have. What I have is the history of a statute which has fallen into disuse for a variety of reasons. Since 1959, very few prosecutions. Very clearly, a total of three since 1969, none of which resulted in a conviction; a statute really if ever applied.

THE COURT: How many times has it been violated? People know of it.

MR. GARBUS: I have asked Mr. Dougherty's predecessor. I have sent a letter to Mr. Dougherty's predecessor indicating that I thought your Honor ought to be concerned with that, this issue. I certainly don't have that in mind of documentation. I'll mark that for the purpose of this record.

Let me read it to you. It's addressed to Mr. Shanley. It's dated September 18, 1973.

"It would, I think be helpful for the purposes of the argument if we were able to give the Judge more information about prosecutions under the Statute. I know that you have seen Mr. Willens' letter. I would gather that the Justice Department would have more detailed information about of those cases including what specifically were the charges and under what counts of the Statute the indictments were brought."

You can't tell whether it's the same kind of charge against Berrios or someone else.

I said, "As you know, the Willens' letter only goes back a few years. I would assume that the Justice Department would have more information

going back to Brown and even before that to the date that the Statute was passed. Would it be possible for your to have that information in Court on the argumen. for presentation to the Judge. Otherwise, I would have to subpoena Mr. Willens and I think at the outset, we should be able to give the Judge that information. If, in fact, there were many many prosecutions, then I think the Judge would not tend to look favorably upon my motion. If, on the other hand, the information that I had given the Judge is accurate, he might feel compelled to go further on a motion."

One of the problems you have in every selective prosecution motion and the difficulty with proving the fact that there has been a selective or malicious prosecution -- in the Berrigan case, at the end -- I'll give you briefs.

The Court dealt with and the attorneys dealt with on the appeal exactly what the criteria were before the Government could be compelled to come forward or before the Court would be required to give some kind of hearing. Now, the proof may be we have in this case is as follows. That Berrios is indicted after having been involved with

a labor dispute. Marriott is a national corporation whose success rests in large part upon the fact that over the years, it alone, perhaps one of the largest corporations has successfully resisted unionization.

It's really not one question of labor dispute in one place. Rather, it's a pattern that Marriott has spent hundreds of thousands of dollars; has used a great deal of political influence over the years to maintain.

The success and reason amongst others, that they can charge lower prices for their product is precisely because of the fact that most of the people who are employed by Marriott are non-union people. That, of course, was one of the issues during the labor dispute. We know Mr. Marriott -- we can be prepared to prove he is the chairman, was the chairman of President Nixon's 1968 and 1972 organizations.

Donald Nixon, the President's brother is a Vice-President of the Marriott chain. That firm is represented. That's represented by Herman Kallenbach, President Nixon's lawyer.

Marriott has said publicly that he is on

a "Bill and Dick" basis with the President. We've indicated in the motion papers some of the attempts with respect to other Teamster leaders.

With respect to Harold Gibbons, there was a great deal of publicity no so long ago about Harold Gibbons, a McGovern supporter in the Teamsters. There were very few. You can count on one hand the number in the Teamsters.

There was a good deal of belief that came out during the Watergate Hearing and also through other sources about how Harold Gibbons who was the only member of the 15 man executive board to support McGovern had the IRS upon him.

Colson is now a member of a Washington law firm which represents the Teamsters. There is internal fighting within the Teamsters between those who supported Nixon and those who supported McGovern. I don't the details for your Honor, the relationship between Nixon and Mr. Hoffa which resulted in Mr. Hoffa getting a parole.

The largest percentage of Teamsters, perhaps 99 percent of them have, did, during last year, support the Republican candidacy.

Mr. Berrios, Gibbons, one or two others,

one of the few Teamsters who publicly supported McGovern -- your Honor will also recall at the time that we had in January, a witness was produced who testified as to Mr. Berrios' political activities on behalf of McGovern.

That testimony was produced long before Watergate, long before the list of enemies, long before we knew anything about what we know now over the last few years.

We also know that the Teamsters gave funds approximately several hundred thousand dollars to the Nixon capaign, raising it through other sources.

In fact, they were actively involved. What you have here, I think, with respect to Marriott is a very significant labor dispute.

You have with respect to Marriott a man who is very close to the administration and a man who has been involved in influence, in something that is very critical to the success of his operation. You have Donald Nixon. Donald Nixon, of course, becomes an entirely different story.

The allegation of the past six months, both have been in the present and various hearings, the

extent to which he has influenced. He's the Vice-President of Marriott.

Yesterday, just to bring you up-to-date, in the New York Post, there was a story about Jack Anderson. I'll give you a copy of that. I have it here. That story relates to the extent to which Donald Nixon uses influence with the President with respect to the Dominican Government.

THE COURT: Let's stick to the case.

MR. CARBUS: I want to make it very clear. That sticking to the case without any more information than we have -- in other words, I don't know what went on. I state that candidly. What went on with respect to Marriott, Donald Nixon and Richard Nixon.

What I'm saying --

THE COURT: The question here is why Mr. Berrios is being prosecuted for being a Trustee of a labor organization after conviction of arson. It may very well have come because he became a suspect in the fire bombing at Kennedy Airport.

They discovered then that he has a prior conviction, in the working of it. The most you'd be entitled to would be to learn who filed the

complaint that may have brought this to the attention of the United States Attorney and perhaps, what knowledge the Labor Department has of other violations that they may have considered not worthy of prosecution.

MR. GARBUS: I don't to belabor how the prosecution came about in this case. I certainly don't know it. I don't want to belabor, also, the January case where your Honor has already expressed an opinion. I withdraw that. It came out wrong. The January case, which ultimately resulted in an acquittal of the defendant, but your Honor will recall in that particular case that the ultimate arrest came some seven months after the alleged incident and the indictment came down a year later. Your Honor will also recall that some three weeks after the incident, no one had yet identified my client. Your Honor also will recall from the witnesses on the stand, their testimony about the bitterness of the labor dispute, whether, the extent to which the first trial involved Barrios has political motivation. I don't know. I don't have to deal with that. That case, happily, is beyong this.

(continued on next page)

SS/LH
Reel 2

I think if I were to come up and make this argument a year ago, I think given the presumption that we generally have about the way the Courts and the law and Grand Jury operate, I think your Honor would be quite proper a year ago in not giving that much attention to the kind of argument that's being made here. I think that what I have said raises sufficient issues so that evidence has to be produced on it. I'd be the first --

THE COURT: Not about Donald Nixon.

MR. GARBUS: With respect to Donald Nixon, the answer is I don't know how the prosecution started. All I know are certain facts. All I know is Donald Nixon, the Vice-President of Marriott, has previously used the legal processes and his brother's office to gain influence for himself and to get results for his clients.

Yesterday's story in the Post is just another of dozens of the stories. We have stories about Donald Nixon, Rebozzo, Mr. Hughes. I don't want to blow the case up into something greater than it is. I don't want this particular hearing to become a small Watergate Commission Hearing or

something like that.

With respect to Berrios, he's entitled, given the facts that we have in this case, given the disuse of the statute, the lack of use, we're entitled to go further and what prompts this?

I think we're entitled to call those people who began this. We're entitled to find out if in fact Marriott played any part in the institution of this prosecution.

THE COURT: What difference does that make?

MR. GARBUS: It becomes a selective prosecution, if Mr. Marriott, because of any access he had to the Government; because he was one of the best friends of Mr. Nixon, can play some role in starting this prosecution. This becomes Mr. Nixon or Marriott's prosecution.

Then we have a selective prosecution argument. In other words, you can't have -- there may be 74 other corporate offices who have similar people like Berrios on their payroll who don't make the call and wouldn't get the same result. That becomes selective prosecution.

THE COURT: I don't think so.

MR. GARBUS: How much further do you have to

go, that someone has been singled out for reasons unrelated to the crime?

If I can, I can give your Honor the brief.

THE COURT: What are the reasons related to the crime?

MR. GARBUS: The mere fact that somebody has committed a crime. Let's assume for the sake of this argument, that Berrios is guilty of a crime. The mere fact that he's committed the crime doesn't mean you can't have a selective prosecution. Selective prosecution argument is irrespective of his guilt or innocence.

I'd be glad to give your Honor the Government brief in the Berrigan case up at the Third Circuit where this issue was discussed. There's no claim that merely because --

THE COURT: Did Berrios have a case in the Third Circuit?

MR. GARBUS: Berrigan case, where they explored. Mr. Standard's partner, representing another and the Government. This issue was discussed at length. I think it was fairly clear that whether or not the defendant has committed crime is not related to the question of whether

there's a bad faith prosecution, unrelated thing.

I admit there's a long way to go here, but you cannot make a more compelling case absent testimony. Absent the assigned piece of paper from Marriott, he made a phone call. There's no other way to prove it.

Now, I could, at the risk of boring you, detail for an hour relationships between Marriott, Nixon and Donald Nixon. All it would do -- and Charles Colson. All it would do is flush out further what I have said; mainly that Marriott is successfully resisting unionization. This is of crystal importance to them; that Marriott, Nixon and Colson have concededly been using every political office to gain influence. I don't think that becomes arguable in any point longer in history.

Yesterday's story in the Post about Donald Nixon using his brother's office, to gain concessions, from someone whom he was then dealing with, the President's office, Dominican Republic, so he can have holdings and luxury apartments. He got that concession.

The following year, the Dominican sugar quota is increased --

THE COURT: Let's stick to the case. Mr. Dougherty, what do you have to say?

MR. GARBUS: The representatives of the Republican Party, the following year, go down to the Dominican Republic and run a campaign.

MR. DOUGHERTY: Your Honor, with regard to Mr. Garbus' reference to a letter that he drafted, information to be supplied by the Department of Justice, I believe your Honor, the existing framework of the law, the burden of proof with regard to demonstrating a selective prosecution clearly rests with the defendant.

What Mr. Garbus is attempting --

THE COURT: Are you willing to accord him the discovery rights that exist under the --

MR. DOUGHERTY: I have your letter addressed to Mr. Herbert Jordon of the firm Rabinowitz, Boudin and Standard, dated June 12th, 1973, which sets forth at least nine instances within approximately a ten year period in which indictments have been returned under Section 504 of the Act.

In the Southern District, we have the case of United States vs. Priore which was tried before Judge Travia -- I'm sorry Judge Mishler. A verdict

of guilty was returned under the Statute. In that same case, Judge Mishler --

THE COURT: What's the number on that case?

MR. DOUGHERTY: I don't have the number. I can furnish the Court with the citation.

I also wish to direct the Court's attention to the case of the United States vs. Ahmad, 347F Supp. 972, a 1972 case in which a similar attack was made on the prosecution in that case.

MR. GARBUS: That's not a 29 U.S.C504 case.

MR. DOUGHERTY: It involved a motion for a hearing on a basis of a claim that a selective prosecution was being initiated and prosecuted in that case.

I would just like to read briefly from the language of the Court's decision in that case.

"In essence the defendants contend that the Department of Justice has maliciously sought prosecution of these defendants not for their criminal conduct alone, but because of their opposition to the war in Viet Nam and their dedication to civil disobedience as a means of bringing the war to an end. They further classify their prosecution as an attempt to vindicate the former

Director of the Federal Bureau of Investigation. Could these motives attributed to the Department of Justice be sustained, there would be no doubt in our mind that prosecution here would fall outside of the proscribed limits of the discretionary control of the executive over the prosectuion of criminal cases. However, upon these bold assertions the defendants cannot place upon the Government the burden of disproving the existence of bad faith. Nor, in light of the authority which frowns upon judicial review of executive discretion, are we justified in examining the prosecutorial files."

Your Honor, I believe what we have here is an identical situation where bold versions are being made alleging that the Government in initiating this prosecution has attempted to vindicate its conduct in prosecuting Berrios in the prior case in which Mr. Berrios was acquitted and it is also alleging the existence of bad faith and bad motives on the part of the Department of Justice attorneys in bringing this prosecution solely on the bold assertions that the President of Marriott Corporation is a close friend and associate of the President of the United States and they are on a first-name

basis and that Mr. Berrios voted for George McGovern and was a McGovern supporter on the record.

I believe these assertions are the rankest kind of speculation and are very much insufficient to shift the burden of proof on the Government in establishing there was not a selective prosecution in this case.

THE COURT: This is an indictment, a superceding indictment. I don't have the original one.

When was the first indictment filed?

MR. DOUGHERTY: First filed on January 8, 1972.

THE COURT: That was before the trial of the fire bomb case. Do your files show who complained of what brought about the filing of the indictment?

MR. DOUGHERTY: The fact that the defendant Berrios had entered a plea of guilty to an arson charge, in the court of an investigation that was initiated by the Bronx County District Attorney's Office in 1970 became a matter of knowledge to Government attorneys; in the course of its investigation, in connection with the prior trial of Pablo Berrios, which resulted in an acquittal.

There were no complaints issued or lodged against Pablo Berrios by any private citizens. As a result of information gleaned from its prior investigation, Mr. Richard Shanley, whc was the Government attorney in the prior case became aware of the fact that Mr. Berrios might possibly also be in violation of Section 504 of the Act and requested authorization from the Department of Justice in Washington to proceed under that Section. That request for authorization followed the normal authorization procedures that are in existence in the Department of Justice.

There's no basis in fact for any claim that Mr. Colson or Mr. Dean had any influence or took any part in the authorization that occurred in this case and infact the Government submits that the reason why there's no such allegation, of course, there's no factual basis for an allegation.

The entire initiation of this prosecution followed the normal course of authorization and proceeding by way of indictment that adheres in every criminal prosecution that the Department of Justice initiates.

THE COURT: It seems to me that there might

be two things that would help me in this. One, would be to have a copy of the letter of Mr. Shanley asking authorization. That may be producable under Rule 16-B which says "The Court may order the attorney for the Government to permit inspection and copying of documents, material for the preparation of defense ..." -- if there is a defense of selective prosecution, I think that may be reasonable.

MR. DOUGHERTY: The Government would be willing to oblige the Court with a copy of the prosecutor's memorandum addressed and sent to the Chief of the Organized Crime Section in the Department of Justice if the defendant had made some factual showing for its allegation of selective prosectuion, but on the basis of these bold assertions, without any support whatsoever in fact, the Government takes the position that under the circumstances, to produce a prosecutor's memorandum, to rebut what in essence is nothing but speculation, is not required under the rules or under the case law.

THE COURT: I think there's enough to justify here. I would issue an order, if need be, requiring

that.

One other thing that may be pertinent. If there's some evidence that the Labor Department knew of other violations and did not report them or the Department of Justice had other violations reported to it and decided not to prosecute, that would be material.

I don't know whether it's the Labor Department or Justice Department that might testify on that.

(continued on next page)

MR. DOUGHERTY: Your Honor --

THE COURT: It's one thing to say the burden is on the defendant. It's another thing to say that the defendant can't get normal civil discovery proceedings in order to sustain that burden.

MR. DOUGHERTY: There really is little, if any, precedence for the subpoena, requiring of the departmental officials to either take the stand or to rebut any allegations of selective prosecution.

The case that Mr. Garbus cites, United States vs. Falk was reversing a partial decision which held on the basis of the allegations in that case; departmental attorneys were not required to take the stand and testify as to their motives.

Furthermore, the Falk case involved a draft prosecution which can be regarded as being suigenerous. Clearly, the Government has a right and the executive branch has a right to select those people with whom, against whom it chooses to initiate prosecution. As long as, in making that selection, it doesn not individually

discriminate and here, I submit, there is no showing of any individual discrimination.

There's no justification or substantial necessity in the law for departmental attorneys or any members of the executive branch to come into court to justify a decision on the part of the executive to bring a prosecution.

THE COURT: Our Court of Appeals likes to send things back to the District Judge to hold another hearing. I'd rather hold a hearing first.

MR. DOUGHERTY: I can supply the Court with information.

THE COURT: I think Mr. Garbus' fears may be set a rest if it turns out there have been no prior complaints filed with the Labor Department or the Department of Justice which have been, under which prosecution has been declined. I don't know how much information you have on it.

We'll break right now. I have a very important phone call.

(Recess.)

MR. DOUGHERTY: I think, your Honor, we were discussing the possibility that the Government might be able to produce some evidence that

Section 504 prosecutions have not been initiated on the basis of some arbitrary classifications.

THE COURT: I thought one way to prove it might be -- what the evidence might be, the extent to which the files of the Labor Department or the Justice Department may show a policy of declining prosecution of complaints.

MR. DOUGHERTY: I don't know -- first of all, your Honor, I don't know of my own personal knowledge whether the files would contain such information.

Secondly, I don't know whether that would rebut the defendant's allegations, sufficiently, to foreclose the issue and thirdly, I don't believe the allegations that the defendants make in the first place require such a showing on the part of the Government.

I think the defendant fails in showing with regard to his own client; there's a fundamental distinction or character particularly his client has which he doesn't share with other possible violators of the statute. On the basis of that characteristic, that distinguishing characteristic, the Government has brought this prosecution.

THE COURT: I think probably I can take this in steps and if I can have the memorandum recommending prosecution provided to the defendant and to the Court, then I'll be able to determine whether the defendant is entitled to anything more.

MR. DOUGHERTY: Your Honor -- the Government would have to resist such an order because, first of all, the prosecution memorandum is an internal Government document.

THE COURT: Yes.

MR. DOUGHERTY: Secondly, it contains information and evidence relating to Grand Jury testimony and to matters of proof which are clearly not producable by the Government to the defendants in a pre-trial discovery situation and thirdly, I think the law supports the view unless the defendant here satisfies some sort of factual burden; that is not compelled to make any showing to rebut the allegation of selective prosecution.

Again, if I may just briefly read from the opinion that I cited before in United States vs. Ahmad.

"Defendants further contend that this Court

has thwarted their Fifthe and Sixth Amendment rights to obtain and introduce evidence relevant to their defense of discriminatory prosecution. First, defendants assail this Court's decision to quash subpoenas served by the defendants upon Richard Kleindienst, J. Edgar Hoover and Norman Carlson in which they sought for the most part discovery of interdepartmental memoranda of the Justice Department and the Bureau of Prisons containing legal memoranda, advisory opinions and prosecutorial recommendations and decisions pertaining to 18 U.S.C. Section 1791 Violations. For reasons identical to those relied upon by the Court in declining to inspect the prosecutor's file in the instant case, we refused to allow the defendants access to these materials, if existent. It is clear that through the subpoenas defendants are attempting to circumvent a long-accepted intolerance toward judicial inquisition into the process whereby prosecutorial decisions are formulated. This Court will not become the vehicle by which the integrity of the executive's decision-making process is violated in pursuit of a claim of discrimination which we consider to be

patently frivolous."

THE COURT: Judge Weinstein just overruled me in the Law Journal this morning in saying that defendants are entitled to co-defendant's statements which I've always refused.

There has to be some consideration of the facts of the individual case rather than of past precedence.

I think, to dispose of this part of the matter, I will direct that the prosecution provide Mr. Garbus and me with a copy of the memorandum recommending prosecution, with any reference to Grand Jury testimony of non-defendants excised.

I don't know if there's anything else confidential in there and maybe the thing to do is to have Mr. Garbus submit an order.

I'll deny the application for the time being in all other respects. Then, you can determine on the basis of the order whether you think it's something you should comply with or take further steps.

MR. DOUGHERTY: May I make this recommendation?

THE COURT: Yes.

MR. DOUGHERTY: I submit to the Court's

inspection, a copy of the Government's memorandum requesting authorization to prosecute and that the Court undertake an examination of the memorandum to determine whether or not anything occurred in the decision to prosecute which might support the defendant's motion and if the Court finds that there is nothing in there and so substantiates that the matter will then be foreclosed and the memorandum returned to the Government without access being given to the defendants.

THE COURT: I don't know just what's in the memorandum. I think the defendants should have a right to examine it.

In Connecticut they open the files.

MR. DOUGHERTY: I never practiced in Connecticut. I'm more concerned, and I think the Government is concerned here with establishing a precedence with regard to interdepartmental and internal documents being furnished to defense counsel on motions such as these.

On the basis of the impact of such an order allowing discovery of such documents, the Government feels that there's substantial matters of prejudice which might result from such an order

and such a precedence and under those circumstances, the Government feels that if the Court wishes to satisfy its own mind that something may be in the internal documents of the Government, that might support the allegations of the defendant; that is one matter.

Perhaps there can be some agreement on that particular compromise?

THE COURT: What about it, Mr. Garbus?

MR. GARBUS: I think I should be entitled to see the documents. Given your Honor's ruling, you should clean the document so I don't see Grand Jury Minutes.

I can't see how anybody can be hurt by the first sentence saying, "I recommend prosecution because ...," or whatever.

THE COURT: Yes.

MR. GARBUS: The suggestion here that this is without precedence is wrong. This is what the Falk case was about. They decided and went to great lengths to tell what should be turned over; when it should be turned over.

THE COURT: I'll direct it be turned over with such excisions as the Government thinks are

necessary for the protection of confidence, Grand Jury Minutes or otherwise.

The balance of the parts excised, I will be willing to look at and see whether I think there's any prejudice in that respect.

Get up an order.

MR. STANDARD: There are two motions, one of which I have no intention of arguing; a disclosure of Grand Jury Minutes. I fully anticipate submitting it.

The second, what is the Government's characterization as an omnibus electronic surveillance motion. It has two branches.

Before I begin, I would like to be certain your Honor has on file all the papers which I believe --

THE COURT: One is the supplemental affidavit that says wiretaps on Mr. Boudin's phone turned up. You should be entitled to everything.

MR. STANDARD: I'm not asking for everything, although I wouldn't refuse it.

If I could, I would like to spell out what I said and what I think the Government's obligations are.

THE COURT: You said all overheard conversations of any of the accused at any stage of the case.

MR. STANDARD: The first part of the application consisted with the standards in Gelbard, to affirm or deny the existence of a tap.

The Government has said in its brief which was filed in August, that it would supply the Justice Department affidavit which suggested whether there was any electronic surveillance on the defendant.

I haven't gotten it.

THE COURT: I have a notion this wasn't going to be heard today.

Mr. Dougherty, is there or are there any documents on Mr. Standard's motion?

MR. DOUGHERTY: There is a memorandum, your Honor, opposing the motion for discovery.

MR. STANDARD: I'm not referring to that, your Honor. I'm referring to the Government's assertion which it must make in light of Gelbard with regard to Branch 1 of the motion, the defendant being a "aggrieved person" within the meaning of the statute.

THE COURT: Your memorandum, Mr. Dougherty says "As of August 6th, the Government will make a representation in the near future as to what information ~~of~~ IN the files revealing as to whether or not there were any overheard conversations by the movant and his co-defendants." That really is not what Mr. Standard is asking for. He's asking for any overheard conversation by the attorneys for the movant and co-defendant.

MR. STANDARD: There are two branches.

THE COURT: Have you provided the first one?

MR. STANDARD: No.

MR. DOUGHERTY: I am ready to provide to the Court a Gelbard affidavit.

THE COURT: Let me look at it.

(Handed to the Court.)

THE COURT (continuing): Any reason why a copy shouldn't be given to Mr. Standard now?

MR. DOUGHERTY: No.

(Handed to Mr. Standard.)

THE COURT: That's a letter of September 13th. That relates to conversations of Berrios, Nuchow, Principe and Julius Zaretsky. That's disposed of.

MR. STANDARD: I don't believe it is, not

by what I would call a longshot.

I begin with this premise, the premise of the United States Supreme Court, known as Plumandon, 407 United States. We know it as United States vs. the United States District Court.

That case and that particular portion of the case cited by the approval of our Circuit in United States vs. Huss Siegal and Smiloew, opinion by Judge Kaufman filed June 26th of this year.

It lays one thing to rest. The Government is saying "Trust us to do the right tning. We've searched our Justice Department files and this submission which has just been handed to me dated September 13th only refers to a search of the Justice Department files. It does not relate to any of the Labor Department files or any of those otner agencies of Government," which I believe I've given you ample authority, clearly require, both ample authority of our Circuit, First Circuit and Fifth.

I'll refer to them in my memorandum. They require more then merely the Justice Department's own files be searched.

What the Justice Department is saying here --

THE COURT: Nobody else conducts electronic surveillance.

(continued on next page)

MR. STANDARD: In light of disclosures of Unted States vs. Russo, Ellsberg, in light of the disclosures in re Beverly, in light of the disclosures in United States vs. Seal, I suggest to that there are at least six agencies of Government which conduct electronic surveillance as a regular matter.

I referred your Honor at the time of the last application and pointed to my supplemental memorandum -- not supplemental affidavit -- but supplemental memorandum, the order of Judge Keith, Western District of Michigan which I will hand up to you, dated June 5, 1973, in which he comes to grips with, as other District Court Judges and Courts of Appeal have, the issue of who does the wiretapping and what is the product of the wiretapping.

He ordered that the United States Attorney supply information from the following institutions: The Intelligence Evaluation Committee, the C.I.A., F.B.I., N.F.A., Department of Justice, The Treasury Department, The Defense Department, The Secret Service. He doesn't get around to the Plumbers.

THE COURT: Russo was a special case. You

can't require that in every indictment that's brought in this court.

MR. STANDARD: Russo may be special --

THE COURT: What is the morality of the question? The question is whether the defendant knew that Berrios had been convicted of arson.

Is that a difficult thing?

MR. STANDARD: That's the way it began, but when I can refer you to, as I believe, I have beyond the pail of mere conjecture a series of facts which the Government has not disputed, nor do I believe it could or will. I'll wait to hear with regard to electronic surveillance, intruding on the relationship between defendant and counsel. Then, I think we have a matter of Sixth Amendment proportion. I think it has to be dealt with here.

THE COURT: It was dealt with last week in the Rosner case. It was said it is not every interception that upsets a conviction. It has to be shown it was material.

MR. STANDARD: Of course, your Honor. I'm at stage one with exploration. I am asking the Government merely to confirm or deny whether it has tapped phones. That's all I'm asking.

THE COURT: They said they didn't tap Boudin's phone.

MR. STANDARD: Mr. McCord says it. It's the United States Government acknowledging.

I submit that if you read my affidavit of September 14th and the supplemental affidavit filed this week, you will find a series, course of conduct, which is far beyond conjecture or surmise as to the nature of unlawful electronics.

THE COURT: I suppose on that, you could put the burden on me to read the logs of these transcripts, the logs of the taps and perhaps, any transcripts that have been made. I don't think there should be any burden to make transcripts of things.

MR. STANDARD: I'm asking Step 1 the Government affirm or deny that the movant being an aggrieved person within the meaning of 3504 and clearly within the Sixth Amendment, to affirm or deny whether there has been any electronic surveillance, lawfully or unlawfully, with order or without order on the series of phones which I have recited, appended to my moving papers.

At this juncture, the Government having made

a representation with regard to the Justice Department vis-a-vis Nuchow.

THE COURT: I thought it was the Boudin phone.

MR. STANDARD: Boudin is my partner. We have the same phone. We've had the same phone for 13 years.

Any conversations which are the subject of an overhear of his phone --

THE COURT: We talked about other names.

MR. STANDARD: I am satisfied if it's Michael Standard, home and office.

I've supplied the Government with all the telephone numbers. Leonard Boudin, Victor Rabinowitz, office and home for each. The Government has the requisite telephone numbers.

It's only after the Government affirms that I would be able to proceed to Stage 2.

THE COURT: Do you have any information on this?

MR. DOUGHERTY: No, I don't intend to affirm or deny with regard to Mr. Boudin or Rabinowitz.

I am indicitive of an affidavit I furnished the Court and Mr. Standard, is that any conversations

between Mr. Standard and Mr. Nuchow and Zaretsky have not been the subject of electronic surveillance. That is the my implication of that affidavit. That's what the Government intends to rely on on this motion.

MR. STANDARD: That's unprecendented, your Honor.

THE COURT: You're entitled to the Gelbard -- Mr. Dougherty called it an affidavit. It's a Gelbard letter.

MR. STANDARD: That's not even acknowledged, subscribed.

THE COURT: It's signed by a lawyer.

MR. DOUGHERTY: It bears --

THE COURT: Do your papers show Mr. Boudin at home or Mr. Rabinowitz at home -- does it show Boudin or Rabinowitz had any conversations with Nuchow or Zaretsky?

MR. STANDARD: I don't represent Mr. Principe. I know that they have had conversations with Mr. Nuchow. I certainly have.

I think I indicated to your Honor very early in this proceeding not only have we known him personally for ten years when he began to get wind

of the investigation, in October, I believe of last year -- he began to consult with me. The relationship of friendship became one of lawyer and client.

A second branch of this motion and I vigorously urge it, the Government affirm or deny as step 1 in an electronic surveillance motion whether it has lawfully or unlawfully placed any electronic surveillance device on my phone. That means Mr. Boudin's phone or Rabinowitz's. That's the same phone, the office phone.

THE COURT: I don't know how those things are done, whether they're put on the switchboard or on the individual wire.

You have separate offices, separate desks, separate instruments?

MR. STANDARD: Everyone is in everyone else's office. We have no separate private wires I'm aware of.

THE COURT: We'll find out what it is.

Is there any reason you say you don't want to do it? Suppose I tell you to do it? Is there any reason why you wouldn't find out what the situation is with respect to taps on these wires,

the lawyer's wires?

MR. DOUGHERTY: Your Honor, again, the Government feels that on the basis of unsupported allegations and imprecise speculations being forced to assume a burden which is the law, does not require us to assume.

Mr. Standard makes no factual assertions in his affidavits as to what conversations, either Boudin or Rabinowitz, which he believes have been the subject of electronic surveillance.

THE COURT: You want him to disclose attorney-client material?

MR. DOUGHERTY: I merely want him to disclose sufficient facts to allow the Government to know, either as to date and time.

MR. STANDARD: Within the scope of this investigation, October, 1972. I can't place it particularly in October, through today.

THE COURT: You're entitled to that. I think that probably wouldn't go any further at this time.

MR. STANDARD: If you would like me to submit a new order with regard to the telephones, I believe that they have been the subject of

conversations between Nuchow, Standard, Rabinowitz and Boudin. I'll be glad to do so.

THE COURT: Give me a new order.

MR. STANDARD: I'll submit an order. We'll stop there.

MR. DOUGHERTY: Does the Court wish the Government to make a statement?

THE COURT: You may.

Mr. Dougherty is going to make a statement. He may convince me to change my mind.

MR. DOUGHERTY: Allow me just to refer to the affidavit of Mr. Standard which I have the date stamped on of September 14th. It's an affidavit that Mr. Standard submitted in connection with this motion.

In his affidavit on Page 2, under Sub-section "i" he cites the case of United States vs. Russo and Ellsberg and offers that as a basis for his motion that the Government is required to affirm or deny whether or not electronic surveillance occurred in this case.

Under subdivision "ii" Mr. Standard refers to the testimony of James McCord in which he stated with specificity that Leonard Boudin had

been the subject of overhearings disclosed in United States vs. Russo.

The only other factual allegation or what may approach a factual allegation appears in Paragraph "v" or V, in which he cites Mr. Boudin's affidavit reflecting what appears to be the observations of wiretapping and apparatus in operation by two men in the basement of a tenement building located within 100 yards of Mr. Boudin's home in New York City.

That, your Honor, is up to September 14th with the allegations made by Mr. Standard in connection with his motion.

Then, Mr. Standard filed a supplemental affidavit dated October 3rd, 1973. He refers to the September 14th affidavit. He goes on to say, to cite the testimony of Howard Hunt before the Senate Select Committe; that he engaged in the "covert operation -- aimed at Ellsberg defense lawyer Leonard Boudin of New York..."

In age, he had access to files on wiretap logs and transcripts. No where does he furnish the Government or Court with any idea of what exactly the basis for that inference is or was.

He refers to a New York Post article dated September 24th, 1973 which in part stated the Post also learned of at least one covert operation aimed at Ellsberg defense lawyer, Hunt's access to the F.B.I. files, possibly wiretap logs.

Later on, on Page 5 of the supplemental affidavit, in Footnote 1, Mr. Standard states "The Court will note that at the arraignment herein I indicated that I had known the defendant Nuchow for some ten years. Conversations with Mr. Nuchow regarding the preceeding indictment in this case, dependency of the investigation and prosecution in United States vs. Berrios, Crim. , were the subject of considerable and detailed conversation in the period October, 1972 to the present."

THE COURT: Do you need anything more than the statement in the September 14th affidavit that the Government revealed in the Russo case that there will be records of conversations between defense counsel during the period of Mr. Boudin's retention from December, 1970 to June, '73?

What you're asked to do now is affirm or deny.

MR. DOUGHERTY: The Government has already affirmed Mr. Boudin was the subject of surveillance in the Russo matter.

THE COURT: I want a statement here what phones were tapped during this period of 10-1-72 to date. If you tap Boudin's phone during that period, you're probably going to wind up giving me the logs to look at.

MR. DOUGHERTY: May I just refer to a decision cited by Mr. Standard, a Ninth Circuit case, United States vs. Alter, 73-1121. The Court cites the case in its opinion of the United States vs. Fitch and Meisel, in which that very same court upheld the District Court's denial of a defense claim and apparent refusal to hold a hearing on that matter; the matter being their attorneys have been the subject of electronic surveillance by someone and noted that the vague and speculative affidavit of counsel required no more than the Government's affidavit denying the monitoring of any conversations of counsel talking with the witnesses.

The Court went on to state the testimony to be whether the allegations in the moving papers

included affidavits, if any, are filed are sufficiently definite, specifically detailed and non-conjecture to enable the Court to conclude a substantial is presented.

The Court went on to enumerate several factors which would satisfy that testimony; namely, the specific fact which reasonably the movant and that means the counsel for the named witness has been subject to electronic surveillance;

Two, the dates of such suspected surveillance;

Three, the outside dates of representation of witnesses by the lawyer during the period of surveillance;

Four, the identity of the person or persons by name or description together with their respective telephone numbers with whom the lawyer or his agents or employees was comunicating at the time claimed surveillance took place;

Five, facts showing some connection between possible electronic surveillance and the Grand Jury witnesses supports that case involved, the Grand Jury witnesses who certify the claim for the Grand Jury proceeding in which the witness is not involved.

THE COURT: They've met all those standards.

MR. DOUGHERTY: The Government does not accede to that finding, your Honor.

THE COURT: Which one isn't met?

MR. DOUGHERTY: Specific facts which could lead the movant to believe that he is named counsel for William Nuchow, had been subjected to electronic surveillance in attempting to do so. It refers to an acknowledgment the Government made in a case of Ellsberg and Russo and not to acknowledgment made in the contention of this prosecution, your Honor.

THE COURT: First Boudin, he has enough here. I'm going to give the order. I hope counsel are getting paid. They're blowing up a relatively small prosecution into a tremendous matter.

I'm not sure what the penalty is on 29-504, but this is not a heroin case.

MR. DOUGHERTY: Would the Court elaborate exactly what the order is?

THE COURT: It's what it is to state whether there have been taps on the telephone of Boudin, Rabinowitz or Standard during the period from October 1, 1972 to date.

MR. DOUGHERTY: If --

THE COURT: If there are such taps I think -- I have some duty to look at the logs and see if there are any references in the logs which give us some summary of the conversations as a result. Any conversations that relate to Nuchow or his co-defendants. It may well be this is a futile search, but if the defendants insist, I think I'll have to give it to them.

Mr. Standard, I'm not going to use this as a basis for your discovery in some other case.

MR. STANDARD: I have no intention of doing that.

THE COURT: Very good.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 83

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UNITED STATES OF AMERICA, :

v. :

73 Crim. 308

PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPLE, JULIUS ZARETSKY, :

ORDER

Defendants. :

----------x

Defendant Pablo Berrios by his attorney, Martin Garbus, Esq., having moved this court for an order compelling a hearing on the selective prosecution aspects of the indictment returned,

And the defendant having served and filed an affidavit of Martin Garbus, Esq., dated August 7, 1973 in support of the defendant's motion to dismiss the indictment on the grounds of selective and unlawful prosecution,

And the United States Attorney having served and filed an affidavit of Richard L. Shanley, Esq., Special Attorney, Organized Crime and Racketeering Section, dated August 9, 1973,

And argument on this motion having been heard on October 12, 1973 by Martin Garbus, Esq., attorney for defendant Berrios, and James Dougherty, Esq., Special Attorney, Organized Crime and Racketeering Section, in opposition, now

IT IS ORDERED that the United States provide counsel for the defendant and the court with a copy of the memorandum of the United States Attorney or the Organized Crime and Racketeering Section, Department of Justice, recommending prosecution of the defendant, and

IT IS FURTHER ORDERED that there be excised from that memorandum any reference to testimony before the Grand Jury of non-defendants.

_____

U.S.D.J.

SO ORDERED

A 85

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Organized Crime Section
Criminal Division
Federal Building
Room 327-A
35 Tillary Street
Brooklyn, NY 11201
November 16, 1973

Honorable Orrin G. Judd
United States District Judge
United States Courthouse
Eastern District of New York
225 Cadman Plaza, East
Brooklyn, NY 11201

Re: United States -v- Pablo Berrios, et al - 73 CR 308

Dear Judge Judd:

On October 12, 1973, a hearing came on before you on a motion for a hearing made by the defendant, Pablo Berrios, to determine whether the government's prosecution of the defendant was selective. Martin Garbus, Mr. Berrios' counsel, alleged that the indictment was returned against the defendant because of his political sympathies and union organizing activity. Underpinning the defendant's position was the argument that the statute, 29 U.S.C. §504, had been little used over the preceding ten year period, and that an inference could be drawn from its' dormancy that the defendant was "targetted" for indictment, in spite of the violation. No facts were put before the Court in support of the claim. At the conclusion of oral argument, the government was ordered to turn over the prosecutive memorandum recommending prosecution in this case.

It is the position of the United States, and the Department of Justice, that the Court's order is unwarranted by the facts and is unsupported by the law. In the course of oral argument, government counsel cited United States -v- Ahmad, 347 F.Supp. 912 (M.D. Pa. 1972), to support its' refusal to turn over the prosecutive memorandum. That position remains unchanged. Since the oral argument herein, the Ahmad case was affirmed by the Third Circuit, United States -v- Berrigan, 482 F.2d 171 (1973), wherein the Court stated:

> "Without denigrating the importance of the right of a person accused of a crime to establish the presence of discriminatory prosecution, central to the issue must be some initial showing that there is a colorable basis for the contention." 482 F.2d at 177

And at page 180, the Court cited the language of Chief Justice (then Circuit Judge) Burger in Newmark -v- United States, 127 U.S. APP. D.C. 263, 382 F.2d 479, 480 (1967):

> "[F]ew subjects are less adapted to judicial review than the exercise by the executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

The Court continued that this basic principle is premised on a recognition of the constitutional separation of powers.

The Court took up the question of quashing of all subpoenas for all government files relating to the decision to investigate and seek indictments in the case, and made the following cogent observations:

1. the subpoenas were an attempt by the defendants to circumvent a long-accepted intolerance toward judicial inquisition into the process whereby prosecutorial decisions are formulated.

2. that intolerance is based upon the public policy of encouraging open, frank discussions between subordinate and chief concerning administrative action and on the constitutional principle of separation of powers, and is reflected in legislation such as exemption (5) of the Freedom of Information Act, 5 U.S.C. §552 (b)(5).

3. F. R. Crim. P. 16(b) specifically exempts from discovery "reports, memoranda, or other internal government documents made by the government agents in connection with the investigation or prosecution of the case...."

4. F.R.Crim.P. 17(c) provides that the Court may quash a subpoena if compliance would be unreasonable or oppressive.

The Berrigan Court concluded that appellants failed to meet their burden of proving a colorable entitlement to the defense of discriminatory prosecution so as to "entitle them to the desired testimonial and documentary evidence."

The defendant cites United States -v- Falk, 479 F.2d 616 (7th Cir. 1973) as support for the relief requested herein. Once again, the Berrigan opinion provides the answer. In footnote 11 on page 179, Judge Aldisert noted for the Court:

> "Secondly, the Falk Court found 'unrebutted evidence..... [which]...made out at least a prima facie case of improper

discrimination in enforcing the law.' 479 F.2d at 623. Appellants here, on the other hand, have submitted no convincing evidence of discriminatory prosecution. Indeed, the Court in Falk premised the granting of a hearing upon an allegation of 'intentional, purposeful discrimination' and the existence of 'facts sufficient to raise a reasonable doubt about the prosecutor's purpose'." (emphasis in text)

The Government submits that the defendant has not produced a single fact to establish either a prima facie case of discriminatory prosecution, or a colorable entitlement to that defense so as to entitle him to the documentary evidence which the Court ordered to be produced by the government. Consequently, the government intends to adhere to the position maintained at the oral argument on the motion herein if and when the case is called for trial. The Court will note, however, that this position is taken reluctantly and without any desire to be in contempt of your order. However, we respectfully submit that the Court's ruling is contrary to the weight of the law.

Your Honor will note that, while the Court directed Mr. Garbus to submit an order, to date no such order has been presented to the government.

Respectfully,

Denis E. Dillon

DED:JWD:dtj

Denis E. Dillon
Attorney in Charge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPE, JULIUS ZARETSKY,

Defendants.
---------- X

73 CR. 308
JUDGE ORRIN G. JUDD

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARTIN GARBUS, Esq., verified the 3rd day of December, 1973, and all the proceedings heretofore had herein, a motion will be made in this Court before the Honorable Orrin G. Judd, on the day of , 1973, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the indictment against defendant PABLO BERRIOS because of the Government's refusal to comply with the order of this Court dated November 21, 1973, which order requires the United States to provide counsel for the defendant and the Court with a copy of the memorandum of the United States Attorney or the Organized Crime and Racketeering Section Department of

Justice recommending prosecution of the defendant, and for such other and further relief as to this court may seem just and proper in the premises.

Dated: New York, New York
November 30, 1973

Yours, etc.,

EMIL, KOBRIN, KLEIN & GARBUS

BY: _____
A Member of the Firm
Attorneys for Defendant BERRIOS
Office and P. O. Address
540 Madison Avenue
New York, New York 10022

TO: JAMES DOUGHERTY, Esq.
Special Attorney
Organized Crime Section
Criminal Division
Federal Building
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35 Tillary Street
Brooklyn, New York 11201

MICHAEL STANDARD, Esq.
Rabinowitz, Boudin & Standard
Attorneys for Defendant WILLIAM NUCHOW
Office and P. O. Address
30 East 42nd Street
New York, New York 10017

JOHN GUTMAN, Esq.
Legal Aid Society
Attorney for Defendant MATTHEW PRINCIPE
Office and P. O. Address
16 Court Street
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 90

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PABLO BERRIOS, WILLIAM NUCHOW, MATTHEW PRINCIPE, JULIUS ZARETSKY,

Defendants.

---

73 CR. 308

AFFIDAVIT

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

MARTIN GARBUS, Esq., being duly sworn, deposes and says:

1. I am the attorney for the Defendant PABLO BERRIOS.

2. I submit this affidavit in support of Defendant's motion for an order dismissing this prosecution because of the Government's refusal to comply with this Court's order that the United States provide counsel for the defendant and the Court with a copy of the memorandum of the United States Attorney recommending prosecution of the defendant.

3. On November 26, 1973, James Dougherty, Esq., Assistant United States Attorney, advised this Court that he would not comply with this Court's order of November 21, 1973. That order required the Government to produce a copy of the Memorandum of the United States Attorney recommending prosecution of the defendant. The order further provided that there be excised from that memorandum any references to testimony before the Grand Jury of non-defendants.

4. That order was entered in response to defendant PABLO BERRIOS' motion for an order compelling a hearing on the selective prosecution aspects of the indictment returned. On August 7, 1973, defendants had filed an affidavit in support of the motion and on August 9, 1973, Richard L. Shanley, Esq., Special Attorney associated with the Organized Crime and Racketeering Section, had filed an affidavit in opposition to the motion. Argument was had on the motion on October 12, 1973. The order submitted by the defendant and subsequently signed by the Court correctly reflects the disposition of the motion.

5. The Government's refusal to comply with this Court's order requires the dismissal of the indictment. Alderman vs. United States, 394 U.S. 165 (1969); Elkins vs. United States, 364 U.S. 206; United States vs. United States District Court, 407 U.S. 297.

6. I therefore request that the indictment against PABLO BERRIOS be dismissed.

MARTIN GARBUS

Sworn to before me this
30th day of November, 1973

Notary Public

ANN E. MENDELSON
NOTARY PUBLIC, State of New York
No. 31-2658865
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

73 CR 308

-vs-

AFFIDAVIT

PABLO BERRIOS
WILLIAM NUCHOW
MATTHEW PRINCIPE
JULIUS ZARETSKY,

Defendants

----------x

STATE OF NEW YORK)
COUNTY OF KINGS) SS:
EASTERN DISTRICT OF NEW YORK)

James W. Dougherty, being duly sworn, deposes and says:

1. That he is a Special Attorney, United States Department of Justice, Organized Crime and Racketeering Section.

2. That the above-captioned matter has been assigned to him for all purposes and that he is familiar with the facts and circumstances thereof.

3. That on January 7, 1974, an order was entered allowing the United States of America thirty (30) days from the date thereof to comply with previous orders entered herein compelling

(a) disclosure by the United States of America whether any electronic surveillance had been conducted by specified departments or agencies of the United States Government on premises of or telephones subscribed to by Leonard Boudin, Victor Rabinowitz and Michael Standard during the period October 1, 1972 up to the date of the order, October 12, 1973.

(b) discovery by the defendant Pablo Berrios of the memorandum recommending prosecution herein.

4. That on January 23, 1974, written communication was received by your deponent from the United States Department of Justice that a review of the Department of Justice files, and inquiry directed to specified agencies, had failed to disclose the occurrence of electronic surveillance of the aforementioned individuals during the relevant period. (Exhibit A)

5. In connection with the substance of paragraph 4 above, I personally forwarded a copy of the Court's written order of October 19, 1973, together with the list of names, addresses and phone numbers furnished by Michael Standard, attached as Exhibit A thereto, to Arthur D. Porcella, Special Attorney-in-Charge of the Special Operations Unit of the Organized Crime and Racketeering Section, United States Department of Justice, under whose direction the survey of records and agencies was conducted.

6. That the substance of the attachment hereto designated as Exhibit A is the product of a formal review of departmental records and written or oral communications between attorneys assigned to the Special Operations Unit of the Department of Justice and officials of the enumerated agencies contained in paragraph 2 of Exhibit A.

7. That, with regard to paragraph 3(b) herein, it is the position of the United States of America that discovery of the prosecutive memorandum is not sanctioned by Federal Rules of Criminal Procedure 16(b) and is unsupported by facts sufficient to establish a colorable entitlement by the defendant Berrios to the relief afforded by the court herein.

Therefore, the Government adheres to the position outlined in a letter addressed to the Court by Denis E. Dillon, Attorney in Charge, Organized Crime Section, dated November 16, 1973.

8. That this affidavit is made in good faith.

Subscribed and sworn to before me
this [illegible] day of January, 1974.

James W. Dougherty

JAMES W. DOUGHERTY
SPECIAL ATTORNEY

[illegible]

WASHINGTON, D.C. 20530

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Reply to the
attention of
Refer to Initials and Number

HEP:
177-

:ADP:sam

JAN 28 1974

Mr. James Dougherty
Special Attorney
Brooklyn Strike Force
Brooklyn, New York

Dear Mr. Dougherty:

This is with regard to your request that we ascertain whether the following individuals and law offices were monitored by electronic surveillance, subsequent to October 1, 1972.

A review of the Department of Justice files discloses no information indicating that conversations of Leonard B. Boudin, Victor Rabinowitz, and Michael B. Standard were overheard by electronic surveillance or that premises known to be owned, leased, or licensed by them were covered by electronic surveillance by the Federal Bureau of Investigation during the mentioned period. Also, no electronic surveillance was conducted at the law offices of Rabinowitz, Boudin and Standard by the Federal Bureau of Investigation during that period.

The above-named individuals and law offices were not subjected to electronic surveillance by the Internal Revenue Service, the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the Central Intelligence Agency, the Bureau of Customs, the United States Department of Labor, or the United States Department of State subsequent to October 1, 1972.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

By: James J. Featherstone

JAMES J. FEATHERSTONE, Deputy Chief
Organized Crime and
Racketeering Section
Criminal Division

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

- against -

73-CR-308
73-CR-22

PABLO BERRIOS
WILLIAM NUCHOW
MATTHEW PRINCIPE
JULIUS ZARETSKY,

Defendants.

January 7, 1974

- - - - - - - - - - - - - - - - - - -x

Appearances:

HON. EDWARD J. BOYD V
Acting United States Attorney
Attorney for United States of America

By: JAMES DOUGHERTY, ESQ.
Special Attorney, Department of Justice
of Counsel

MARTIN GARBUS, ESQ.
Attorney for defendant Berrios

RABINOWITZ, BOUDIN & STANDARD, ESQS.
Attorneys for defendants Nuchow and Zaretsky

By: MICHAEL STANDARD, ESQ.
of Counsel

JOHN GUTTMAN, ESQ.
Legal Aid Society
Attorney for defendant Principe

J U D D, J.

MEMORANDUM AND ORDER
on Motions to Dismiss.

Defendant Pablo Berrios was indicted on January 8, 1973, charged with violating 29 U.S.C. § 504 by wilfully holding union office within five years after his conviction of arson in the Supreme Court of New York, Bronx County. A superseding indictment filed on March 26, 1973 repeated substantially the same charge against defendant Berrios and also charged defendants William Nuchow, Matthew Principe and Julius Zaretsky in count two with violating 29 U.S.C. § 504 by wilfully and knowingly permitting defendant Berrios to hold union office after his conviction. Thereafter, defendant Berrios moved to dismiss the indictment on the grounds that Section 504 violates the First, Fifth and Fourteenth Amendments, and the constitutional prohibition against bills of attainder (Article I, Section 9, Clause 3), and was pre-empted by Section 7 of the National Labor Relations Act.

The Defendant Berrios asserted as a separate ground for dismissal that he was the victim of a "selective prosecution" in violation of the equal protection clause of the Fourteenth Amendment. He offered to prove specific facts,

which are set forth in the discussion later.

Defendants Nuchow and Zaretsky moved for disclosure of any electronic surveillance to which the defendants had standing to object, including surveillance of their counsel. All defendants joined in the motions of the other defendants.

Defendant Berrios had been acquitted in this court on February 7, 1973 of a charge of attempting to destroy a Marriott restaurant at John F. Kennedy International Airport with a firebomb. 18 U.S.C. § 844(i); 72 CR-1222. The charge was related to a labor dispute. The acquittal, of course, determined only that there was a reasonable doubt of his guilt. The firebomb charge was a felony, while the present indictment charges only a misdemeanor.

On October 12, 1973, the court heard oral argument on the defendants' motions. At the completion of argument, the court orally ordered the government to affirm or deny whether specific federal agencies had conducted electronic surveillance of defendants' counsel and to provide defense counsel and the court with a copy of the memorandum recommending prosecution of the defendants. These orders were subsequently issued in written form on October 19 and November 26, respectively.

The government has not yet complied with the October 19 order. The government has denied conducting electronic surveillance of the defendants by letter dated September 13, 1973, but Mr. Standard has submitted evidence that his law partners' wires were tapped in connection with other cases. Information concerning surveillance of counsel's conversations is still to be supplied.

By letter dated November 16, 1973 signed by Denis E. Dillon, Attorney in Charge, Organized Crime and Racketeering Section, Brooklyn Field Office, Department of Justice, the government has informed the court that it "intends to adhere to the position maintained at the oral argument on the motion" that the prosecutive memorandum is not producible and "without any desire to be in contempt" will refuse to comply with the order of the court made orally on October 12, 1973 and formalized in a written order on November 26, 1973.

The defendants have moved to dismiss the indictment based on the government's refusal to comply with the court's orders.

The Constitutionality of 29 U.S.C. § 504

Defendant Berrios claims that 29 U.S.C. § 504 is

unconstitutional in that it abridges rights guaranteed by the First, Fifth, and Fourteenth Amendments and the constitutional prohibition against bills of attainder (Article I, § 9). After careful consideration of the defendant's contentions, the court finds them to be without merit.

Defendant's first claim is that the statute infringes on the freedom of association guaranteed by the First Amendment. However, 29 U.S.C. § 504 does not prohibit the defendant from joining a union or associating with either its membership or leadership. All the statute prohibits is the defendant's holding of union office. The prohibition contained in 29 U.S.C. § 504, like any job disability imposed by statute, cannot be premised upon the exercise of rights protected by the First Amendment. United States v. Robel, 389 U.S. 258, 88 S.Ct. 419 (1967). See Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694 (1972). This is the import of Brown v. United States, 334 F.2d 488 (9th Cir. 1964), aff'd on other grounds, 381 U.S. 437, 85 S.Ct. 1707 (1965), relied upon by the defendants. This principle does not help the defendant, for his "job disability" is based upon the prior commission of a specific criminal act, not upon activity protected by the First Amendment.

Defendant Berrios also claims that 29 U.S.C. § 504 violates the guarantee of equal protection contained in the Fourteenth Amendment. Although the Fourteenth Amendment is applicable only to the states, the due process guarantee of the Fifth Amendment prohibits unjustifiable discrimination by the federal government. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954). Applying the method of analysis developed by the Supreme Court, defendant's equal protection challenge must fail. A statute which does not base differential treatment upon "inherently suspect" classifications or touch upon the exercise of fundamental rights

> must be sustained unless [the legislative classification] is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest.

Frontiero v. Richardson, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768 (1973). The statute, 29 U.S.C. § 504, differentiates between persons convicted of specified felonies and those who have not been so convicted. This is permissible for

> [A] classification based on criminal record is not a suspect classification.

Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970). Nor is the holding of union office a fundamental right justifying the application of a stricter test. See Upshaw v. McNamara,

supra, 435 F.2d at 1190. Therefore the differential treatment under 29 U.S.C. § 504 must be upheld if the classification rests

> upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

F.S. Royster-Guano v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561-62 (1920).

Historically, 29 U.S.C. § 504 was enacted as part of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq. The primary purpose of the Act was

> to correct the abuses which have crept into the Labor and Management field and which have been the subject of investigation by the Senate Committee on Improper Activities in the Labor and Management field for the past several years.

H.R. Report No. 741, 86th Cong., 1st Sess., p. 9. 1959 U.S. Code Cong. and Admin. News, p. 2424. See 29 U.S.C. § 401. One of the main abuses discovered by the McClellan Committee and against which the bill was directed was the infiltration of unions by

> criminal elements who found their way into the labor movement and exploited the workers whom they pretended to serve.

H.R. Rep. No. 741, supra, 1959 U.S. Code Cong. and Admin. News at 2431.

In attempting to cleanse the leadership of the labor movement of "criminal elements," it was entirely reasonable for Congress to treat persons with criminal records differently from persons without such records. While it is true that some persons without criminal records would be susceptible to corruption, it was not arbitrary or unreasonable for Congress to determine that the "screening out" of such persons was impractical. Likewise, while some persons with criminal records would not be susceptible to further corruption, it was not unreasonable for Congress to require such persons to demonstrate their rehabilitation over a five year period.

What has been said above also answers the defendant's contention that 29 U.S.C. § 504 is an unreasonable means of achieving a concededly legitimate governmental aim and therefore violates the due process clause of the Fifth Amendment. In upholding a more restrictive New York statute, the Supreme Court cited 29 U.S.C. § 504 with approval and stated:

> Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas.

De Veau v. Braisted, 363 U.S. 144, 158-159, 80 S.Ct. 1146, 1154 (1960).

Defendant Berrios next contends that 29 U.S.C. § 504 violates the due process clause of the Fifth Amendment in that it does not provide a hearing prior to precluding convicted felons from holding union office. This argument, however, misconceives the very nature of the legislative process. In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970), and the other "procedural due process" cases relied upon by the defendant, the issue was whether it could be determined that an individual failed to meet legislatively established eligibility standards without affording that individual an opportunity to be heard. It was recognized that

> where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.

Goldberg v. Kelly, 397 U.S. at 269, 90 S.Ct. at 1021 (1970).

In the instant case, the defendant is challenging not the application of a standard to a particular situation, but the standard itself. There can be no doubt as to the application of the standard. Defendant's conviction is a matter of public record. The presentation of witnesses in an adversary setting is not required.

Furthermore, 29 U.S.C. § 504(a)(B) provides that a person convicted of one of the enumerated felonies may have a hearing before the Board of Parole to determine whether the disqualification should be removed.

Defendant's final constitutional argument is that 29 U.S.C. § 504 constitutes a bill of attainder in violation of Article I, section 9, clause 3 of the Constitution. This argument is answered by United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707 (1965). In that case, the Supreme Court held 29 U.S.C. § 504 unconstitutional to the extent that it imposed criminal penalties upon members of the Communist party who became union officers while they were party members or within five years after the termination of their membership. In invalidating that portion of Section 504, the Court implicitly approved of the portion attacked by defendant Berrios; for it said:

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics.

381 U.S. at 449-50, 85 S.Ct. at 1715-1716. In the portion of

the statute challenged by defendant Berrios, Congress has done exactly what it failed to do in the portion held invalid in Brown. It has set forth a general rule declaring that persons who commit certain acts (the enumerated felonies) shall not hold office and has left it to the judicial process to determine which persons have committed those acts. The statute is not, therefore, a bill of attainder.

The defendant also claims that 29 U.S.C. § 504 is pre-empted by Sections 1 and 7 of the National Labor Relations Act, 29 U.S.C. §§ 151, 157.

The doctrine of pre-emption, which is based on the Supremacy clause of the Constitution, Article VI, ¶ 2, has no application to an alleged conflict between two federal statutes. Moreover, in DeVeau v. Braisted, 363 U.S. 144, 156, 80 S.Ct. 1146, 1152 (1960), the Supreme Court recognized that 29 U.S.C. § 504 was not inconsistent with general federal labor policy.

Selective Prosecution

The defense of selective or discriminatory prosecution finds its origin in the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886). In that case, the petitioners challenged their convictions for violating a San Francisco

ordinance which prohibited the operation of laundries in buildings constructed of material other than brick or stone without first obtaining the consent of the Board of Supervisors. The petitioners alleged that the Board's consent was withheld only when the applicant was Chinese, and that only Chinese were prosecuted for violating the ordinance. They alleged that approximately eighty laundries were operated by non-Chinese in wooden buildings without consent and that no legal action had been taken. In reviewing the petitioners' convictions, the Supreme Court stated:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

118 U.S. at 373-74, 6 S.Ct. at 1073.

In Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501 (1962), the court emphasized that the mere exercise of some degree of prosecutorial discretion was not sufficient to sustain an equal protection challenge. To be successful, the defendant had to show that:

> The selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

368 U.S. at 456, 82 S.Ct. at 506.

A defendant presenting a defense of selective enforcement need not show that the alleged discrimination is directed toward a class, but need only "show an intentional or purposeful discrimination." Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963); United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973) (en banc).

At the October 12, 1973 hearing on the motion, the defendant Berrios stated that he would show the following at a "selective prosecution hearing" if such a hearing were ordered by the court: (1) That since 1959 there have been only a few prosecutions under 29 U.S.C. § 504 and since 1969 there have been only three; (2) that Berrios was indicted after having been involved in a labor dispute with the Marriott Corporation; (3) that Mr. Marriott was the chairman of President Nixon's 1968 and 1972 campaign organizations; (4) that Donald Nixon, the President's brother, is a vice-president of Marriott; (5) that Marriott's attorney, Herbert Kalmbach, is also President Nixon's attorney; (6) that there was an internal battle in the Teamsters Union between those who supported President Nixon's campaign for re-election and those who supported the candidacy of Senator McGovern; and

(7) that defendant Berrios was one of the few Teamster officials who publicly supported Senator McGovern.

These allegations were sufficient to warrant a hearing on the selective prosecution issue. In United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc), the defendant, who was active in a draft counseling organization known as the Chicago Area Draft Resisters, was charged with failure to possess selective service registration and classification cards and with refusing to submit to induction. The defendant asserted a selective prosecution defense and offered to prove the following at a hearing: (1) That 25,000 persons had handed in draft cards and were not prosecuted; (2) that top officials of the Justice Department approved the prosecution, an unusual procedure for a draft case; (3) that there had been a delay in defendant's indictment; (4) that defendant was a vocal and active dissenter; and (5) that the government prosecuted only those card violators who also refused to submit to induction. The district court refused to hold a hearing on these allegations. In reversing the defendant's conviction and remanding the case for a "selective prosecution hearing," the court held that

> When a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose . . . .

a prima facie case was established and a hearing was required. 479 F.2d at 620-21, 623.

Defendant Berrios' offer of proof was similar to that made by the defendant in Falk, supra, in that he offered to prove that prosecution was rare under the statute, that the prosecution was initiated "at the top," and that the prosecution was initiated because of the defendant's exercise of rights guaranteed by the First Amendment. This offer of proof was sufficient to create a prima facie case of selective prosecution. See United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). Even in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the principal case relied upon by the government, the selective prosecution defense was rejected after a hearing. See also United States v. Malinowski, 347 F.Supp. 347 (E.D. Pa. 1972); United States v. Maplewood Poultry Co., 320 F.Supp. 1395 (D. Me. 1970).

The duty of those charged with the administration of justice to allay the suspicion that political or ideological considerations influence the application of legal standards was recently emphasized by (then) Attorney General Richardson. The Building of a New Confidence, 45 N.Y.S.B.J. 455,456 (1973).

Defendant having shown that he was entitled to a hearing, it was within this court's discretion to order the production of material in the government's possession that would aid the defendants in their examination of witnesses. Cf. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). At a "selective prosecution hearing," the defendants, after establishing a prima facie case, may call government officials as witnesses. Thus, in United States v. Falk, 479 F.2d at 623, the court held that the defendant could question the Assistant United States Attorney. In United States v. Steele, 461 F.2d at 1151, a hearing was held at which the defendant was allowed to examine the Regional Technician for the census in Hawaii. In United States v. Malinowski, 347 F.Supp at 354, a hearing was held at which defendant was allowed to examine the special agent of the IRS who investigated the case, the Chief of the Intelligence Division for the Eastern half of the Pennsylvania IRS District, and the Assistant United States Attorney who made the decision to prosecute. An example of a similar hearing in a civil case is Center on Corporate Responsibilities, Inc. v. Shultz, 42 L.W. 2314 (D. D.C. 1973).

Given the right of the defendants in this case to examine the prosecuting authorities, the memorandum recommending prosecution became material to the conduct of such examination, and its production could be required at the hearing. The government has not even complied with that portion of the order that directed that the memorandum be supplied to the court. Examination of the memorandum by the court might perhaps have obviated an evidentiary hearing, by showing that there was no arguable basis for defendant's claim.

In refusing to comply with this court's order, the government relies upon United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973). However, in that case, the court recognized that the defendants would have been entitled to obtain the prosecutorial memoranda had they met their "burden of proving a colorable entitlement to the defense of discriminatory prosecution." The court in that case found, however, that the defendants had not met their burden. In the instant case, this court has concluded that the defendants have met their burden and as such are entitled to such memoranda.

This court's action in ordering the production of the memorandum recommending prosecution is not inconsistent with Rule 16(b) of the Federal Rules of Criminal Procedure.

That rule governs pretrial discovery. It does not dictate the procedure to be followed by the district courts in the actual conduct of hearings.

The court having issued a proper order in this case and the government having failed to comply, it is within this court's power to dismiss the indictment. Cf. Alderman v. United States, 394 U.S. 165, 184, 89 S.Ct. 961, 972 (1969). If the indictment fails against defendant Berrios, it should be dismissed also against his co-defendants who are charged with aiding and abetting him.

While the government has refused thus far to comply with the court's order, it may have had some uncertainty about the underlying reasoning or the sanction which might result. It should be entitled to consideration similar to that given in discovery proceedings in civil actions under F.R.Civ. P. 37, namely, conditioning the dismissal on continued refusal to furnish the documents after a reasonable time for further consideration.

It is therefore ORDERED that the indictment be dismissed, unless the United States within thirty days after the date of this Memorandum and Order (1) makes available to the defendants Nuchow and Zaretsky the tapes and available

transcripts of all conversations of any member of the firm representing them which have been overheard and (2) submits to the court the memorandum recommending prosecution, for the court's study and for release to the defendants of any portions thereof which the court shall determine are not required to be kept confidential.

U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA

-against-

73 CR 308

PABLO BERRIOS, WILLIAM NUCHOW,
MATTHEW PRINCIPE, JULIUS ZARETSKY,

Defendants.

February 8, 1974

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J U D D, J.

ORDER

The Court by its Memorandum and Order dated January 7, 1974, having directed that the indictment be dismissed unless within thirty days the government submit to the Court for review and for possible disclosure to the defendants the memorandum recommending prosecution of Pablo Berrios among other things, and James W. Dougherty, Esq., Special Attorney of the United States Department of Justice, Organized Crime and Racketeering Section, having submitted an affidavit sworn to January 24, 1974, adhering to the government's refusal to produce such memorandum, and such memorandum not having been produced it is

ORDERED that the indictment be dismissed as against all defendants.

ORRIN G. JUDD
U. S. D. J.